Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MIDWEST GAS USERS' ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Energy Regulatory Commission has exclusive authority under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and under the Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.* (Title I wellhead price controls repealed by P.L. 101-60, July 26, 1989) for establishing maximum lawful prices for first sales of natural gas at the wellhead and for guarantying the passthrough of those prices to the retail natural gas market. After extensive litigation and appeal, The D.C. Circuit ruled that certain state taxes levied on natural gas production in the state of Kansas (1) exceeded the maximum lawful price established under the NGPA and were unlawfully collected; and (2) should be refunded to the consumers who paid. The State of Kansas, through its utility regulatory commission, desires to divert these refunds to benefit the shareholders of the local distribution companies that it regulates instead of returning the unlawful overcharges to the customers who paid them. Such a program deprives the roughly one million Kansas customers who paid the overcharges of the benefits of the refund. The Federal Energy Regulatory Commission, with full knowledge of the decision of the Kansas Corporation Commission, refused to impose conditions on a settlement agreement that would assure the passthrough of the refunds to customers who were overcharged.

The questions presented are:

(1) Whether the FERC has the authority to condition a settlement agreement concerning refund of amounts improperly collected in excess of the NGPA's maximum lawful price under the NGPA to assure that the refunds are returned to the customers that paid the excessive and unlawful prices.

(2) Whether the FERC and the Federal Courts lack power to enforce the maximum lawful price regulations enacted by Congress in the Natural Gas Policy Act by causing unlawful overcharges to be returned to the consumers who originally paid those overcharges.

LIST OF PARTIES

Petitioner:

Midwest Gas Users' Association

Respondents:

Federal Energy Regulatory Commission

Missouri Gas Energy Company, a Division of Southern Union Corporation

Indicated Producers, consisting of

Amoco Production Company
Mobil Oil Corporation
OXY USA Inc.
RME Petroleum Co.
Union Pacific Resources Co.

Pioneer Natural Resources USA, Inc.

Missouri Public Service Commission

Kansas Gas Service Co., a Division of ONEOK, Inc.

Kansas Corporation Commission

State of Kansas

Williams Gas Pipelines Central, Inc.

STATEMENT PURSUANT TO RULE 29.6

Midwest Gas Users' Association is an unincorporated, voluntary, non-profit association of industrial and commercial natural gas users in the states of Missouri, Kansas, Nebraska and Arkansas, formed in the early 1950's for the purpose of representing the interests of these large commercial and industrial concerns in natural gas regulatory matters. Midwest operates solely for the purpose of promoting the general commercial, professional, legislative, or other interests of its membership in establishing and preserving reasonable rates and terms of service for large commercial and industrial natural gas customers.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Circuit of the District of Columbia in this case.

OPINIONS BELOW

The Orders of the Federal Energy Regulatory Commission review of which Petitioner seeks are:

Williams Gas Pipelines Central, Inc., 95 FERC (CCH) ¶ 61,055, Docket No. RP98-52-040 *et al.* "Order Approving Settlement," issued April 12, 2001; and

Williams Gas Pipelines Central, Inc., 95 FERC (CCH) ¶ 61,366, Docket No. RP98-52-041 *et al.*, "Order Denying Rehearing," issued June 11, 2001.

These Orders are included in the Appendix. The December 7, 2001 and February 15, 2002 Orders of the Court of Appeals, D.C. Circuit, granting a Motion for Summary Affirmance and denying rehearing or rehearing en banc, respectively, are not otherwise published, but are included in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Order Granting Summary Affirmance on December 7, 2001, and issued its Order denying a timely-filed Petition for Rehearing or for Rehearing En Banc on February 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Natural Gas Policy Act, 15 U.S.C. § 3431:

. . . .

(c) Guaranteed passthrough

. . . .

(2) Recovery of just and reasonable prices paid. For purposes of sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d), the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds

Natural Gas Policy Act, 15 U.S.C. § 3411. – General rulemaking authority

(a) In general. Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or

> delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

Natural Gas Act, 15 U.S.C. § 717. – Regulation of natural gas companies

. . . .

> (b) Transactions to which provisions of chapter applicable. The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

This case concerns the diversion of some $45 million of refunded natural gas overcharges away from the parties that paid them under color of Federal law. It is rooted in collections of rates charged for natural gas sold under the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.* ("NGPA").

Title I of the NGPA established ceiling prices for natural gas sold at the wellhead to pipeline suppliers; these ceiling prices prescribed the maximum lawful price that could be charged by the producers for sales within the respective wellhead categories. 15 U.S.C. §§ 3311-19.[1]

Beginning in October 1983 and continuing through June 1988,[2] Kansas natural gas producers violated the NGPA's maximum lawful price ceilings by including Kansas *ad valorem* taxes in their charges. *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988) (*"Colorado Interstate"*); *Public Service Company of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996), *cert denied*, 520 U.S. 1224 (1997).

In this case, the unlawful charges then were passed on by Williams Gas Pipelines Central, Inc., successor to Williams Natural Gas Co. ("Williams"), an interstate pipeline regulated by the Federal Energy Regulatory Commission ("FERC"), to local distribution companies and then to the retail customers, dollar for dollar. Williams' FERC-approved rate structure provided for this passthrough as a commodity charge to Williams' direct and indirect customers through its purchased gas adjustment clause and, in turn, through the similar automatic adjustment clause that was part of each local distribution company tariff. Although each local distributor had its own tariff, each operated to pass the unlawful charges directly through to the retail consumers.

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1. Nearly 15 years later, as a part of its deregulation program, Congress repealed the NGPA price ceilings effective in 1993. Pub. L. 101-60, Sec. 2b, July 26, 1989, 103 Stat. 158.

2. The producers actually charged such prices from the beginning of implementation of the NGPA in 1978, however, the relevant period established for refunds was proscribed as the period of October 1983 through June 1988 by *Public Service Company of Colorado v. FERC*, 91 F.3d 1478, 1490-91 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

The tariffs of the local distribution companies were approved by the Kansas Corporation Commission ("KCC"), Kansas' regulatory agency. K.S.A. 66-101 *et seq.* Under Kansas law, approved tariffs have the force and effect of law. *Grindsted Products Inc. v. Kansas Corporation Commission*, 262 Kan. 294 (1997). Accordingly, retail Kansas customers were required by law to pay the unlawful charges as a part of the price they paid for natural gas purchased under the NGPA. Approximately one million Kansas customers paid a total of about $45 million in FERC-approved but still unlawful charges through their natural gas bills.

There is a long judicial history underlying this case. As early as 1983, petitions were filed with the FERC challenging whether the Kansas taxes should be included in the NGPA lawful ceiling price calculations. In *Sun Exploration & Production Co.*, 36 FERC ¶ 61,093, 61,233 (1986), FERC initially allowed producers to collect the taxes in addition to what otherwise would have been the maximum lawful price. The FERC's decision was appealed in *Colorado Interstate, supra*, but the Court of Appeals disagreed, remanding the issue back to FERC for further determination. On remand, FERC reversed its position and determined that collection of the Kansas taxes exceeded the maximum lawful price regulations, making the collections unlawful under the NGPA. FERC's new position was affirmed in *Public Service Company of Colorado v. FERC, supra.*

Public Service confirmed that a pricing violation had occurred and ordered that the excess charges would have to be refunded to the ***consumers*** that had paid the excessive charges. *Id.*, 91 F.3d at 1489. *Public Service* also characterized the intervening pipelines and distributors as "mere conduits for the ***flow of refunds from producers to consumers.***" *Id.*, at 1491 (emphasis added).

Later, the same Court in *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264 (D.C. Cir. 1999), *vacated in part on reh'g*, 200 F.3d 867 (D.C. Cir. 2000), confirmed that the taxes should be refunded to the consumers ***with interest***, rather more than strongly suggesting that the consumers had been deprived of their property through the unlawful charges.

Following procedures established by FERC,[3] Williams sought refunds from 652 different producer interests totalling $45.8 million in principal and $88.4 million in interest calculated through May 31, 2000. Through compromises, 636 claims were eliminated. On February 23, 2001, Williams filed a Settlement Agreement ("Settlement") under FERC Rule 602, purporting to resolve the remaining claims.

Almost simultaneously, on March 6, 2001, the KCC began hearings on distribution of these refunds. The purpose of the hearings was to justify diverting all of the refunds to the regulated local distributors as an offset against certain unpaid customer bills. Out of the one million entitled Kansans, only some 50,000 customers were to have their bills all or partly offset. On May 3, 2001, the Kansas Corporation Commission entered an order adopting this approach.

At FERC, several parties opted out of the February 23 Settlement, and Midwest timely objected to the Settlement on the basis that in *Public Service Company of Colorado v. FERC, supra*, and *Anadarko Petroleum Corp. v. FERC, supra*, the Court of Appeals had directed that the unlawful charges should be refunded to the ***consumers*** who had originally paid them. The Settlement provided neither protection nor assurance of this result. The KCC, acting with entirely opposite purposes, was proceeding on a course to confiscate the refunds and divert them to the benefit of the

3. *Public Service Company. of Colorado, et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

shareholders of the local distributors. Under the KCC plan, Midwest' Kansas members, who had paid roughly 30% of the unlawful charges to which refunds would attach, would have their refunds of roughly $12 million taken from them and given to local distributors' shareholders. Further, the refunds of roughly one million Kansans, valued at roughly $45 million, would be confiscated and given over to the local distribution companies.

In both its original Protest and its Application for Rehearing, Petitioner Midwest sought to draw FERC's attention to the actions of the Kansas Corporation Commission and demonstrated that the action of the KCC contravened the express intent of the NGPA and the NGA. Nevertheless, in approving the Williams February 23 Settlement (Appendix A, p. 1a), and in subsequently denying Midwest's Application for Rehearing (Appendix B, p. 32a), the FERC stated that it lacked authority to impose conditions on the Settlement that would protect the consumers claiming that to do so would regulate retail distribution, an area of regulation claimed to be exclusively within the province of state regulatory authority.

Midwest's request for rehearing was denied (Appendix B, p. 23a), and a Petition for Review pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r, was timely submitted to the Circuit Court of Appeals for the District of Columbia. On December 7, 2001, a Motion for Summary Affirmance was granted by that Court. Appendix C, p. 33a. Midwest's timely Petition for Rehearing or Rehearing by the Court En Banc was denied on February 15, 2002. Appendix D, p. 36a. Midwest now seeks a writ of certiorari from this Court.

In failing to address a known condition that is violative of the directives and purpose of the NGPA and the NGA, FERC abandoned its statutory mandate and failed to comply

with the mandates of the Court of Appeals. Unless corrected, FERC's decision will result in the vast majority of the one million Kansas natural gas customers being denied refunds of the NGPA-violating overcharges they paid that were originally charged to them under color of Federal law.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for at least two reasons. *First*, absent correction, FERC's actions will redistribute millions of dollars unlawfully collected in violation of Congress' maximum price ceilings to parties who were mere conduits, did not pay and have no interest in or claim to the overcharges, and will do so in complete derogation of the consumer protections purportedly provided to these customers by the NGPA.

The price ceilings of the NGPA were enacted by the Congress to protect consumers, not producers, interstate pipelines, nor local distributors. Here charges were found to have exceeded the protective ceilings enacted by the Congress. It is nonsense to argue that neither the FERC nor the Federal courts have sufficient jurisdiction under the NGPA to rectify this wrong and refund the unlawful charges to those who paid them under color of the NGPA.

The NGPA, the NGA, and previous decisions of this Court establish a clear framework for establishing prices and regulating transportation of natural gas. This framework would be seriously undermined by allowing the FERC to avoid its responsibilities through a purported jurisdictional gap. Moreover, the regulatory framework will be changed in a fashion that will expose future retail ratepayers to the confiscation of their money through Federally established rates with no Federal forum in which to determine their right to refund.

Second, the FERC's jurisdictional escape hatch and the acquiescence of the Court of Appeals, if permitted, will deny Petitioners and the one million Kansas customers who paid the overcharge any Federal determination of their legal rights under Federal law to the charges that have been held to have been unlawfully collected under Federal law.

Despite salutary language in earlier opinions expressing concern for the consumers and customers that Congress sought to protect through imposing price ceilings, FERC and the Court of Appeals have failed to recognize the claims of Petitioners, disregarding the body of Federal law that produced the overcharges now being refunded. Rather than directly decide the claims of Petitioners to the refunds, FERC and the Court of Appeals have avoided the issue leaving Petitioners with no resolution and no Federal forum for consideration of their claim for return of property taken from them or means of effectively protecting their interests.

A. FERC's Refusal to Direct Refunds to the Customers Who Paid Them Abdicates Its Duties Under the Natural Gas Act and the Natural Gas Policy Act and Should Be Corrected.

Both the NGA and the NGPA had at their core the purpose of providing rate protection to the end use consumer. NGPA additionally sought to balance the developing energy needs of the nation with this protection. This purpose was clearly recognized in the Federal judicial decisions ordering refunds of the Kansas taxes that were unlawfully passed through to consumers under Federal law. *Public Service Company of Colorado v. FERC, supra; Anadarko Petroleum Corp. v. FERC, supra*. Even if the FERC's jurisdiction over refunds that impact retail rates was in question, a recent decision by this Court in *State of New York v. FERC*, 535 U.S. __, 122 S. Ct. 1012, 152 L. Ed. 2d 47, 70 U.S.L.W.

4166 (2002) establishes that the FERC may engage in regulation of retail activity. Finally, even if it is still argued that FERC has no authority to deal with local or retail issues as to ***lawful*** charges, FERC certainly has remedial authority under the NGPA to force the refund of charges held ***unlawful*** under that Federal law.

1. The NGPA Was Designed to Provide Protection to Retail End-Use Customers.

The mid-1970's saw an "energy crisis" resulting in Congressional passage of both the Public Utility Regulatory Policies Act, 16 U.S.C. § 2601 *et seq.* and the NGPA. In its 1978 NGPA, Congress sought to balance the concerns of encouraging conservation, increasing energy production and protecting consumers. The NGPA's multiple price ceilings were intended to mitigate the effect of wellhead price decontrol while rewarding producers for developing new sources of gas and allowing pricing to escalate with inflation. This Congressional purpose is frustrated by FERC's failure to exercise jurisdiction.

2. Incremental Pricing Under the NGPA Extended Direct Federal Regulation of Pricing for Retail Customers.

It is also certain from the NGPA that Congress intended its reach to encompass state regulators and end-users. Proof is found in the NGPA's incremental pricing provisions.

Sections 201-04 of the NGPA provided for an alternate fuel equivalent incremental pricing regime. Incremental pricing surcharges were directed to industrial boiler fuel end-users to eliminate any incentive those users might have to increase their use of natural gas. These incremental pricing regulations were directed at ***retail*** end-user industrial boiler

fuel consumers. FERC was empowered to develop the incremental pricing surcharge; FERC was empowered to calculate the NGPA maximum lawful prices that producers could charge. Certainly based on the previously noted litigation at the Court of Appeals, the Court of Appeals upheld FERC's authority to make these calculations.

Congress, exercising its commerce powers, reached through these respective "conduits" to decree that industrial boiler fuel customers who were behind local distributors should nevertheless pay the incremental fuel surcharge. Collection was through a surcharge that applied to "incrementally priced industrial facilities served indirectly through any other interstate pipeline ***or any local distribution company***." Section 204(c)(2)(b) (emphasis added). In Section 205(d), Congress explicitly preempted state or local laws that mitigated these passthroughs and prohibited state regulators from actions that might dilute their effect. NGPA Section 506 even authorized the United States Attorney General to bring enforcement or injunctive actions to effectuate these provisions.

In the face of such full exercise of its commerce power, it is disingenuous to assert that neither the FERC nor the Federal judiciary possess the ability to fully rectify the violation of Congress' price ceilings. Nor is it sensible to argue that the overcharge has been refunded by diverting the consumers' refunds to the benefit of the local distributors' shareholders. An overcharge to "A" is not refunded by paying "A's" refund to "B".

This exercise of direct authority over retail rate issues confirms a Congressional intent under the NGPA that will be thwarted by FERC's failure to protect retail customers here.

3. Judicial Decisions Authorizing the Refund of Kansas Taxes Express the Intent That the Refunds Be Returned to the Customers That Paid Them.

The refusal of the Court of Appeals to squarely address the question of ratepayers' interest in the refunds is puzzling in light of that Court's own rulings ordering the refunds and establishing consumers' rights to them. In *Public Service Company of Colorado v. FERC*, 91 F.3d 1478, 1492 (D.C. Cir. 1996); the Court of Appeals stated:

> Producers are liable to refund all Kansas ad valorem taxes collected with respect to production since October 1983. . . . ***There is no substantive reason therefore, to deny customers all the relief to which they are entitled***.

The *Public Service* Court also noted that some retroactivity in the refund date

> properly balances the producers' equitable claim to notice ***against the consumers' legal right*** to receive a refund of all unlawfully collected charges.

91 F.3d at 1489 (emphasis added). The same Court noted that there was "well established precedent for treating pipelines as ***mere conduits*** for the flow of refunds ***from producers to consumers***." 91 F.3d at 1491 (emphasis added) (internal citations omitted).

The term "customers" was illuminated later in *Anadarko Petroleum Corp. v. FERC, supra*, when the Court of Appeals stated:

> [t]here is ***no reason why, in the Commission's words, 'overcharged consumers should forego refunds they are entitled to***, to the extent producers paid more ad valorem taxes to Kansas localities than they should have.

Anadarko Petroleum Corp. v. FERC, supra, 196 F.3d at 1269. Thus the term "customers" referred to the retail customer to whom NGPA prices were passed through pursuant to 15 U.S.C. § 3431(c).

The clear language of these cases manifests intent that the refunds will follow a reversal of the path that was used to collect the unlawful charges from the retail ratepayer. The Court of Appeals used the words "passed through" in describing the charge of the NGPA to the FERC to assure that maximum lawful prices were tracked from producer to consumer. Yet in the face of these seemingly plain statements of intent to return unlawful charges to those who paid them, namely the consumers, the FERC now takes the position that it is powerless to provide correction of its own errors to the intended beneficiaries of the judicial decisions.

This position stands Congress' regulatory scheme on end by holding that the FERC has full authority to assure ***collection*** of rates and surcharges from end-use consumers, but strangely lacks the authority to ***refund*** those charges that were unlawfully passed through the pipeline and distribution system. Moreover, the Court of Appeals – having once ordered that ad valorem taxes be refunded to the consumers, and then again having ordered that refunds were to accrue interest thereby further evidencing an understanding that the money came from retail customers who were entitled now to compensation through interest for the lost use of their funds – that same Court now finds that the FERC is powerless to take the necessary steps to assure that the refunds are returned to those who paid them.

The Court of Appeals relied upon *FERC v. Martin Exploration Management Co.*, 486 U.S. 204, 207 (1988). Reliance on *Martin* does not support the creation of the regulatory gap being created by the decisions below. Rather, *Martin* supports Petitioner that NGPA Section 501, 15 U.S.C.A. § 3411, gives FERC authority to enter "such orders as it may find necessary or appropriate to carry out its functions." 486 U.S. at 213. Attaching conditions to assure compliance with Court of Appeals' directives as requested by Midwest would seem both appropriate and necessary and therefore well within the FERC's jurisdiction. *Martin* thus substantiates Petitioner's position that FERC has the authority under the NGPA to direct refunds to the customers by use of orders that impose appropriate conditions on the Williams February 23 Settlement.

B. The FERC's Jurisdictional Argument Conflicts With This Court's Recent Rulings.

If the FERC's claim that it lacked jurisdiction to reach to the retail market was ever correct under the NGA, this position no longer is appropriate. Recently, this Court approved the extension of FERC regulatory authority into retail energy transactions in *New York et al. v. FERC, supra*.[4] Upon nearly identical language of the Federal Power Act,[5]

4. The *New York v. FERC* decision was released on March 8, 2002, roughly three weeks after the Court of Appeals denied Petitioner's Request for Rehearing or Rehearing En Banc. Thus this decision was not available to the Court of Appeals at the time of its last decision.

5. The companion section of the Federal Power Act, Section 201(b), 16 U.S.C. § 824(b), refers to the "transmission of electric energy" instead of the NGA's "transportation of natural gas." Similarly, the Federal Power Act refers to "sale of electric energy at wholesale in interstate commerce" in lieu of the NGA's "sale in interstate commerce of natural gas for resale." In all other respects, the two sections are identical.

this Court held that FERC could engage in regulation of unbundled electric transmission at the retail level. In recognition of the similar language and timing of their passage, this Court has established a practice of citing interchangeably decisions interpreting the Federal Power Act ("FPA") and the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

New York v. FERC, supra, construed the provisions of the FPA to give FERC authority to regulate unbundled electric transmissions by retail utilities, extending FERC's authority into the retail market as a logical construction of the FERC's authority over transmission. This Court found that there were no limitations in the FPA over transmission and that unbundled retail transmissions are "electric energy in interstate commerce." *Id.*, Slip Opinion, p. 14. Accordingly, this Court affirmed regulation of both price and terms of service relating to unbundled *retail* transmission of electricity.

FERC's authority to regulate natural gas transportation is certain irrespective of whether the gas transported is ultimately sold at retail or wholesale. *FPC v. Louisiana Power & Light Company*, 406 U.S. 621, 636 (1972). Certainly, the FERC's authority under the NGA should be accorded similar reach to its authority over electric transmission. This is particularly appropriate where the NGPA conferred upon FERC certain pricing authority coupled with the obligation to guarantee the passthrough of properly established maximum prices. 15 U.S.C. § 3431(c). In this instance, the FERC's authority was not merely limited to oversight of transportation, but its authority included an express duty to assure passthrough of no more than the maximum lawful prices. Any reasonable construction of the FERC's authority must necessarily include the power to correct – the power to direct refunds that fully rectify the wrong done – the power

to see that the unlawful collections are returned to the ultimate consumers who paid them. The ability to require refunds is essential to enable FERC to remedy for overcharges.

In the instant case, the need for such power is readily apparent. Though the history of the matter is complex, the resulting issue is merely how refunds of the unlawful overcharges are to be returned. Despite Petitioner's concerns, the FERC refused to take actions that would assure that the distribution of refunds would remain consistent with federal law and policy regarding return of the ad valorem taxes. The NGPA expressed Congress' creation of a detailed structure to assure that wellhead prices were accurately passed through to retail customers. In addition, the judicial decisions creating the refunds of *ad valorem* taxes contain repeated references to customers and consumers interchangeably. Thus the statutory and case law framework for determining who has a legal interest in the refunds all point to the retail customers who paid the unlawful overcharges as the proper recipients. Yet the FERC deferred to state authority rather than fulfill its obligation to assure that the proper parties receive the refunds.

C. The FERC's Abdication of Jurisdiction Regarding Refund of Unlawfully Charged Kansas Taxes Leaves Customers Without the Protection of Law As to the Unlawful Charges.

The regulation of, and setting of rates for, natural gas service in interstate commerce has long been the province of the FERC and its predecessor, the Federal Power Commission. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides that the FERC has jurisdiction over the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale. Pertinent to the issue at hand, the FERC was given specific authority

under the Natural Gas Policy Act to establish maximum lawful prices; the passthrough of such costs was specifically directed by the Congress. Under the NGPA, "first sale" prices, once established by the FERC, were deemed to be just and reasonable. 15 U.S.C. § 3431(b). In addition, prices so determined as just and reasonable were assured a "guaranteed pasthrough" under 15 U.S.C. § 3431(c):

> [T]he Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act. . . .

FERC was given a pervasive role in establishing natural gas pricing and assuring that the pricing was properly passed through to the retail level. Congress clearly sought to transfer the prices accurately and directly to the consumer with FERC designated as the watchdog.

Even if it were assumed that neither FERC nor the Federal courts have power to interfere in the collection of ***lawful*** charges at local levels, it simply does not follow that these institutions lack jurisdiction to effect refunds of charges that were collected in violation of Federal law. A clear distinction may be made that while state regulators may be free to regulate the affairs of the utilities under their supervision without Federal involvement, when charges are collected under color of Federal law and are subsequently found to have been collected in violation of Federal law, the Federal government has an interest in seeing that the wrong that has been done under color of its authority is fully corrected.

Implicit in the role of assuring the consistent implementation of natural gas pricing is the companion role of redressing overcharges that result from improper pricing. The Congress clearly provided for the guaranteed pass through of the pricing mechanism established under the NGPA, and it would defy reason to argue that Congress had no intent that remedies for improper pricing would not receive similar protections.

This view, if accepted will leave all ratepayers vulnerable for the law will become one of certainty where rate *collection* is involved, but where unlawful overcharges occur, ratepayers will have no similar forum for *refund* relief. The otherwise seamless web of federal/state regulation will develop a tear between state and federal authority such that retail customers will have nowhere to assert claims of entitlement to refunds.

Consideration of the Kansas tax refunds is unique. Consequently, the issues raised here cannot be left for further determination by the lower courts. Because of the singularity of this occurrence, the issues cannot be left for resolution under other circumstances in other jurisdictions. The matters here will likely not occur again, and Petitioners will have no further opportunity to obtain redress.

CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER APPROVING SETTLEMENT ISSUED APRIL 12, 2001

UNITED STATES OF AMERICA 95 FERC ¶ 61,055
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Williams Gas Pipelines Central, Inc.

Docket No. RP98-52-040

ORDER APPROVING SETTLEMENT

(Issued April 12, 2001)

On February 23, 2001, as amended on March 22, 2001, Sponsoring Parties[1] filed a Settlement Agreement (Settlement) under Rule 602 of the Commission's Rules of Practice and Procedure in the above-captioned docket. The Settlement is intended to facilitate and expedite the Commission's implementation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service Company of Colorado v. FERC* (*Public*

1. Sponsoring Parties consist of Williams Gas Pipelines Central, Inc., formerly Williams Natural Gas Company (Williams), Ash Grove Cement, Atmos Energy Corporation, Farmland Industries, Inc., FMC Corporation, Heartland Cement, Kansas Gas Service Company, a Division of ONEOK, Inc., the Kansas Corporation Commission (KCC), Kansas Industrial Energy Supply Company, Lone Star Industries, Inc., Amoco Production Company, Pioneer Natural Resources USA, Inc., Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company.

Service)[2] involving the refund of Kansas *ad valorem* taxes. The Settlement is a partial resolution of *ad valorem* tax refund claims asserted by Williams that were not resolved by a previous settlement that resolved certain *ad valorem* tax refund claims made by Williams.[3] The Commission approved the Superseding Settlement in Docket No. RP98-52-038 on October 11, 2000,[4] as clarified on December 13, 2000, in Docket No. RP98-52-039.[5] For the reasons stated below, the Commission approves the Settlement.

I. Background

In *Public Service*, the Court upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices under the Natural Gas Policy Act (NGPA), and ordered first sellers/producers to make refunds of reimbursements they had received from Williams for certain *ad valorem* taxes. The Commission had required refunds commencing in June 1988. The Court's decision extended the refund requirement to the period from October 1983 through June 1988. On September 10, 1997, the Commission issued an order (Procedural Order) implementing the *Public Service*

2. 91 F.3d 1478 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

3. The parties refer to the earlier settlement as the "Superseding Settlement" because it replaced one Williams had filed on October 1, 1999. Therefore, we will also refer to the earlier settlement as the Superseding Settlement.

4. 93 FERC ¶ 61,030 (2000).

5. 93 FERC ¶ 61,263 (2000).

decision.[6] The Procedural Order established procedures and timetables for producers to make refunds to the pipelines and for the pipelines to flow the refunds through to their customers. The Procedural Order also denied requests for generic relief from the interest obligation associated with the *ad valorem* tax refund principal but provided first sellers could apply for exception relief on a case-by-case basis under section 502(c) of the NGPA. The Court affirmed the Commission in *Anadarko Petroleum Co. v. FERC.*[7]

The Commission also stated that the refund obligations attributable to royalty interest owners could be waived if such refunds were shown to be uncollectible in accordance with the standards in *Wylee Petroleum Corporation v. FERC*, 33 FERC ¶ 61,014 (1985). Subsequently, in an order issued June 10, 1998, the Commission held that the producer who operates a well is responsible only for refunds attributable to its own working interest, and other working interest owners are responsible for refunds related to their working interests.[8]

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6. Public Service Co. of Colorado, *et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

7. 196 F.3d 1264, *reh'g*, 200 F.3d 867 (D.C. Cir.), *cert. denied*, 147 L Ed.2d 248 (June 6, 2000). The Court remanded one issue concerning the starting date for refunds, and the Commission issued an order addressing the remand, Public Service Company of Colorado, 91 FERC ¶ 61,025, *reh'g denied*, 93 FERC ¶ 61,264 (2000), *appeal pending sub nom*, Atlantic Richfield Co. v. FERC, No. 01-1065 (D.C. Cir. filed Feb. 9, 2001).

8. Williams Gas Pipelines Central, Inc. *et al.*, 83 FERC ¶ 61,351 (1988). The D.C. Circuit affirmed the Commission's ruling in an unpublished opinion in Colorado Springs Utilities v. FERC, No. 98-1582 (D.C. Cir. decided December 9, 1999).

Appendix A

In accordance with procedures established by the Commission, Williams sought refunds from 652 operators and working interest owners (WIO). The refunds sought by Williams totaled $45.8 million in principal and $88.4 million in interest through May 31, 2000. Many of the parties from whom Williams sought refunds disputed Williams' claims, and/or sought relief in formal proceedings filed with the Commission. In an effort to resolve these matters, representatives of the various interests involved in the proceeding participated in extensive settlement discussions that led to the filing of the Superseding Settlement on August 7, 2000. The Commission subsequently approved the Superseding Settlement, which eliminated the claimed refund obligations of 636 of 652 working interest owners that Williams had identified as having refund obligations.

Williams is also one of the interstate pipelines involved in a proceeding before the Kansas Corporation Commission in Docket No. 99-GIMG-068-GIG that pertains to a portion of Williams' non-jurisdictional *ad valorem* tax refunds.[9]

Since the Commission's approval of the Superseding Settlement, the remaining parties have engaged in continuing discussions in an effort to structure a settlement that would resolve the remaining outstanding refund claims in this proceeding. The subject Settlement resulted from those discussions. The Settlement, along with a Stipulated Settlement Agreement filed with the KCC (and attached to

9. "In the Matter of a General Investigation Upon the Motion of the Commission Staff to Establish General Policies With Regard to Distribution of Kansas Ad Valorem Tax Refunds from Interstate Pipeline Companies to Kansas Jurisdictional Direct Sales Customers."

the Settlement as Appendix C), will resolve all issues between the Settling Parties, but will not affect claims among non-Settling Parties. Sponsoring Parties expect that approval of the Settlement, as revised, will resolve 58.9682% of all the outstanding claims, leaving only the claims related to refunds due to Missouri jurisdictional customers outstanding.[10] To bring substantial immediate relief to many consumers and to simplify the remaining issues to be resolved, Sponsoring Parties request the Commission to approve the settlement without modification by April 13, 2001.

In accordance with the terms of the Settlement, Williams filed an amended Settlement on March 22, 2001, to reflect changes due to the additional Missouri parties that elected to participate in the Settlement.

II. The Settlement

The Settlement is available on a voluntary basis to all parties with an interest in these proceedings. Producers who accept the terms of the Settlement, and make payment in accordance with its terms, will become Settling Producer Parties. Settling Producer Parties will receive a 25% credit toward their refund obligation.

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10. Sponsoring Parties originally expected the Settlement to resolve 58.9040% of the claims. That number was revised to 58.9682% to reflect the additional Missouri parties electing to participate in the Settlement. The 58.9682% represents 58.8749% relating to Non-Missouri Settling Non-Producer Parties and 0.0933% relating to Missouri Settling Parties.

Appendix A

Parties who are entitled to receive a share of the Kansas *ad valorem* tax refunds on the Williams system and all of the state commission that regulate one or more of such entities are considered to be Non-Producer Parties. All Non-Producer Parties will be deemed to be Settling Non-Producer Parties unless they elect to opt out of the Settlement in accordance with the procedures specified in the Settlement.[11] The portion of the Non-Producer Parties' interest in Williams' Kansas *ad valorem* refund attributable to the Settling Non-Producer Parties is referred to as the Settlement Percentage.

If any state commission elects not to be bound by the Settlement and serves notice in accordance with the Settlement's provisions, its election will be effective so that all parties whose rates are regulated by the electing state commission will be deemed to have elected not to be bound by the Settlement. The rights and obligations of any party electing not to be bound by the Settlement will be unaffected by the Settlement with respect to the portion of its interest covered by the notice.

Payments received by Non-Producer Parties under the Superseding Settlement will have no impact on the rights of Non-Producer Parties under the Settlement and the terms of the Settlement will have no impact on the rights of the Non-Producer Parties to participate in the benefits of the Superseding Settlement.

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11. In its reply comments, Williams advised that parties electing to opt out of the Settlement consist of the MoPSC, City Utilities of Springfield, Missouri, Missouri Gas Energy, UtiliCorp United (only with respect to the interests of its Missouri customers), and Greeley Gas Company (only with respect to the interests of its Missouri customers)

Appendix A

The Settlement is subject to and conditioned upon final approval without modification by the KCC of the separate Stipulated Settlement Agreement, attached as Appendix C, that was filed in Docket No. 99-GIMG-068-GIG attributable to Williams only.[12] The Stipulated Settlement Agreement was submitted, on the same date that the Settlement was filed at the Commission, to the KCC for approval. The Stipulated Settlement Agreement resolves issues regarding the KCC's jurisdiction over Williams' retail sales during 1983 to 1988 and establishes the amount of nonjurisdictional sales Williams made in Kansas that are subject to the KCC jurisdiction.

A summary of other provisions of the Settlement follows:

Release from Liability

Settling Producer Parties will be released from any further liability to Williams and any other party with respect to the entire non-jurisdictional portion of their refund obligation and with respect to the part of the jurisdictional portion of their refund obligation represented by the interests of the Settling Non-Producer Parties.

Williams will continue to have a claim against each of the Producer Parties including the Settling Producer Parties for that portion of their refund obligation related to the refund claimed by the Non-Producer Parties that opt out of the Settlement. The interests of Non-Producer Parties who opt

12. The KCC states the KCC docket was opened in 1998 to investigate *ad valorem* tax refunds attributable to nonjurisdictional sales within Kansas.

out of the Settlement are not released or compromised as a result of the Settlement. With respect to the claims of the Non-Producer Parties who opt out of the Settlement, the Settling Producer Parties will retain all of their claims and defenses, as well as all rights to continue, pursue or initiate litigation in any forum.

Williams, each Settling Producer Party and each Settling Non-Producer Party release all claims other than those specifically preserved in the Settlement that they may have against a party bound by the Settlement related to Kansas *ad valorem* tax refund claims arising from Williams' refund proceedings for all refund periods before June 28, 1988.

As of the date the Settlement is effective, Settling Producer Parties waive and release all claims associated with Kansas *ad valorem* tax refunds for periods through June 28, 1988 by each such Settling Producer Party against any royalty interest owner for royalty-related Kansas *ad valorem* tax refund claims on the Williams system, but only to the extent that the claims against royalty interest owners are attributable to the interests of the Settling Non-Producer Parties. Settling Producer Parties will refund any amounts, without interest, to royalty interest owners that the royalty interest owners paid before the Settlement's effective date for refunds associated with Kansas ad valorem tax refunds for periods through June 28, 1988 on the Williams' system covered by the Settlement.

Appendix A

Settlement Payments

Each Producer Party's refund obligation due under the Settlement is shown on Appendix A. This refund obligation is calculated by reducing the total principal and interest due from each Producer Party by 25%.[13] Next, this reduced obligation is multiplied by the Settling Non-Producer Parties' interest (58.9682%) to determine the Producer Party's refund obligation to the Settling Non-Producer Parties.[14] Then, any prior payments that the Producer Party made to Williams, as adjusted to reflect only the Settling Non-Producer Parties' interests, are subtracted from the net refund obligation due. This results in the final refund obligation due for each Producer Party.

Settling Producer Parties must pay their net refund obligation to Williams no later than 12 days after the Settlement's effective date. Producers who previously refunded to Williams more than their refund obligation shown on Appendix will be entitled to a refund unless they opt out

13. Interest is calculated at the Commission rate if an escrow account was not established or at an estimated escrow rate if an escrow account was established. Interest will continue to accrue until the Interest Cut-Off Date, which is 60 days before the Settlement becomes effective.

14. Certain Settling Producer Parties were relieved of some refund obligations by the Superseding Settlement because a portion of their refund obligation was stated as a separate line item that was automatically waived. The figures listed in Appendix A include the amounts previously relieved in the Superseding Settlement. The parties intend that the total refund credit for Settling Producer Parties under this Settlement will not be greater than this 25% credit.

of the Settlement. Williams will refund such overpayments, with interest, no later than 20 days after the Settlement's effective date.

Effective Date

The Settlement will become effective on the first date on which both of the following conditions are satisfied: (A) the Commission's order approving the Settlement is final and non-appealable and (B) the KCC's final agency action approving the Stipulated Settlement Agreement attached as Appendix C to the Settlement is final and non-appealable.

Acceptance by the Settling Parties of each agreement is conditional upon entry of a final Order approving each agreement by the FERC and the KCC, respectively. Failure by either regulatory body to enter the appropriate Order, without material change, or failure for any reason of either Order to become final shall void both agreements.

Distribution

Williams will distribute (by refund or credit to unpaid bills) the amounts it receives under the subject Settlement within 14 days of the date on which it receives payment. Pursuant to the Superseding Settlement, any funds Williams receives will be applied first i) to reimburse Williams for the net amount of the Settling Non-Producer Parties' portion of the refund payments that Williams returned to producers under the Superseding Settlement plus interest at the Commission's established rates, and ii) refunds to Settling Producers that previously paid more in refunds than they are

required to under the Settlement. The amount received by Williams under the Settlement related to the interests of the Non-Missouri Settling Non-Producer Parties less their portion of Williams' refunds described above will be allocated to the Settling Non-Producer Parties as follows:

1. Kansas Jurisdictional Customers: 68.6535%
2. Kansas Non-Jurisdictional Customers: 16.6550%
3. Oklahoma Jurisdictional Customers: 5.1894%
4. Nebraska Jurisdictional Customers: 0.6487%
5. Texas Jurisdictional Customers: 0.0701%
6. Colorado Jurisdictional Customers: 0.0175%
7. Williams: 8.7658%

The amount received by Williams under this Settlement related to the interests of the Missouri Settling Non-Producer Parties less their portions of Williams' refunds described above will be allocated to those Missouri customers listed on Appendix B (as revised) that did not opt out of the Settlement.

Amounts allocated to the various jurisdictional groups will be distributed pursuant to the percentage allocations in Appendix B to the Settlement. Total refunds to Settling Non-Producer Parties will be reduced by the Kansas *ad valorem* tax refunds previously received by those parties except those pertaining to the Superseding Settlement.

If the Commission approves the Settlement without modification, the non-settling Non-Producer Parties will not be bound by the percentages set forth in Appendices A and B

as to the allocation between jurisdictional and non-jurisdictional customers or by the percentages allocated to specific customers set forth in Appendix B.

Effect of Subsequent Judicial Determinations and Legislation

The Settling Parties intend the Settlement Agreement, together with the Stipulated Settlement Agreement attached as Appendix C, to be a full and complete resolution of any and all issues related to Kansas *ad valorem* tax refunds on the Williams' system, to the extent of the interests of the Settling Parties, and this Settlement Agreement will govern the rights and obligations of the Settling Parties thereon. Should any decisions in cases currently pending in federal and state courts related to the legal rights and obligations of the parties with respect to the payment and distribution of Kansas *ad valorem* tax refunds conflict with this Settlement Agreement, and apply to Williams and its customers, the terms of this Settlement Agreement shall apply in lieu of any such decisions, to the extent allowed by law, with respect to the claims of the Settling Parties.

Regardless of any legislative enactment, whether presently pending or subsequently introduced or enacted, the Settlement shall govern the rights and obligations of the Settling Parties, to the extent allowed by law.

III. Comments

Public notice of the Settlement was issued on March 1, 2001, with initial comments due as provided in section

154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2000)). Reply comments were due on March 22, 2001.

Farmland Industries, Inc. (FI), a sponsoring party to the Settlement, filed a late motion to intervene in support of the Settlement. TPI Petroleum, Inc. (TPI) filed a late motion to intervene asserting that it is entitled to refunds since Williams was the pipeline supplier to its predecessors during the relevant time period.[15] Midwest Gas Users' Association (MGUA) also filed a late motion to intervene asserting that its members, as customers of Williams during the relevant time period, are entitled to refunds.[16]

MGUA filed objections to and comments on the proposed settlement. MGUA asserts that during the relevant refund period, its members were customers of Williams and its predecessors, purchasing approximately 30% of the total volumes sold by Williams during that period and paying approximately 30% of the total volumetric overcharges on the Williams system. MGUA protests that the Settlement does not give assurance to Kansas ratepayers that they will ultimately receive their appropriate share of refunds. MGUA maintains that to assure Kansas ratepayers that they will receive their appropriate share of refunds, the Commission should not approve the Settlement without a condition requiring Williams to make payments to: (1) Midwest in trust

15. TPI states that it received refunds from Williams for the period 1992-1995 but not for any prior period.

16. Since FI, TPI and MGUA have shown an interest in this proceeding, we will grant the late motions to intervene.

for payment to its members, (2) LDCs in trust for distribution to the ultimate customer based on class usage during the pertinent period, and/or (3) the former customers directly.

The State of Kansas and the Kansas Corporation Commission (collectively, the KCC), Kansas Gas Service (KGS) and UtiliCorp United (UtiliCorp), on behalf of its Kansas customers,[17] filed initial comments urging approval of the Settlement. In its initial comments, KGS states that the comments in MGUA's late filed notice of intervention are improper and legally and factually incorrect. KGS maintains that MGUA members did not purchase gas directly from Williams, but from Kansas LDCs and MGUA's concerns about how local distribution companies will distribute refunds to their customers involve matters that are reserved to the KCC. The KCC also answers MGUA's late filed notice of intervention in its initial comments. The KCC disputes MGUA's allegation that the KCC and its Staff misstated their position, noting it represents a myriad of interests, which means that every resolution determined by the KCC may not represent each party's optimal outcome. KCC concludes that MGUA's claims for refunds are not within FERC's purview.

Williams' initial comments restate the benefits of the Settlement, stress that the Settlement provisions are fair and reasonable when viewed on their merits in the context of

17. On behalf of its Missouri customers, UtiliCorp states that it agrees to be bound by the Settlement if the MoPSC elects to be bound by the Settlement. If the MoPSC opts out of the Settlement, UtiliCorp asserts its Kansas customers should still receive the full benefits of the Settlement.

pending competing claims, and urge the Commission to approve the Settlement without modification promptly.

Although it elected to opt out of the Settlement, the Missouri Public Service Commission (MoPSC) filed initial comments seeking assurance from the Sponsoring Parties and the Commission that the rights and claims of a Non-Settling Non-Producer Party, as well as any customers bound by a state commission's decision to be a non-settling party, are not compromised by the Settlement. MoPSC also requests that Appendix B to the Settlement be corrected to reflect the proper allocation of refunds to Missouri customers that are served by Greeley Gas Company and that the negative allocation of refunds to the City of Liberal, Missouri, be explained. MoPSC also requests that the Settlement be amended to provide that a Settling Producer Party will be released from any further liability only to Williams or any other settling party.[18]

In its Initial Comments, City Utilities of Springfield, Missouri (CU), a municipality not regulated by the MoPSC that elected to opt out of the Settlement, objects to the Settlement because Williams will make refunds to Kansas direct-sales customers, but has no plan to refund non-jurisdictional dollars to any other customers, including

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18. Section III.A presently provides "Each Settling Producer Party will be released from any further liability to Williams or any other party with respect to the entire non-jurisdictional portion of their refund. . ." MoPSC requests it to be revised to read "Each Settling Producer Party will be released from any further liability to Williams or any other **settling** party with respect to the entire non-jurisdictional portion of their refund. . ."

customers in Missouri. CU contends that since it was a direct sales customer as well as a wholesale customer of Williams during the period in question, some percentage of the non-jurisdictional refunds that Williams will retain under the Settlement belongs to CU. Therefore, CU objects to the Settlement's attempted resolution of this issue and to Williams' refusal to distribute these dollars to its non-Kansas direct sales customers.

TPI Petroleum (TPI) filed comments and a request for a technical conference. Although not necessarily contesting the Settlement, TPI asserts that the Commission should suspend approval pending a technical conference where Sponsoring Parties could explain the Settlement, provide and discuss any documentation supporting the Settlement, answer questions parties may have, and discuss the Settlement's ramifications to the "non-FERC jurisdictional customers" in Kansas. TPI maintains a technical conference is necessary because Williams has not provided information needed to analyze the Settlement. In addition, TPI states that the significant reduction in refund amounts, plus the elimination of all interest on such amounts, does not appear to be just and reasonable. TPI also questions the allocation of refunds between states and between customer classes within states.

IV. Reply Comments

In its reply comments, CU objects to Williams' suggestion that the Settlement will resolve claims relating to CU. CU reiterates that the Settlement does not resolve any of its claims since it is not regulated by the MoPSC and reserves its right to pursue refund claims on a FERC-

jurisdictional basis and on a non-jurisdictional/direst-sales basis. If the Commission ultimately approves the Settlement, CU argues that the approval should clearly state that its rights are not affected in any way by the Settlement.

The Indicated Producers (IP),[19] the KCC, KGS, Pioneer Natural Resources USA, Inc., and Williams filed reply comments supporting expeditious approval of the Settlement without modification. In addition, Williams, IP and KGS confirm that MoPSC's understanding of the rights and claims of a Non-Settling Non-Producer Party under the Settlement is correct. Williams and IP contend, however, that the Commission should not grant MoPSC's request to amend the Settlement because the change is not necessary to protect MoPSC's interest and would alter the compromise reached by the parties.

In response to CU's concern that the Settlement may impact CU's nonjurisdictional refund claim in Missouri, IP, KGS and the KCC assert that the Settlement has no impact on those claims. IP, KGS and the KCC further assert that CU is free to pursue any claims from Williams concerning nonjurisdictional refund claims in the appropriate legal or regulatory forum.

KGS, the KCC, IP and Williams dispute MGUA's claims that its members were customers of Williams during the relevant time period. They contend that MGUA's members purchased gas from LDCs that purchased gas from Williams.

19. Indicated Producers consist of Amoco Production Company, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company.

Similarly, Williams and the KCC maintain that TPI's claim involves nonjurisdictional sales in Kansas. IP, Williams, the KCC and KGS[20] maintain that MGUA's and TPI's concerns involve matters that are solely within its purview and the Commission has no authority to direct the KCC to distribute refunds in any particular way. In addition, the KCC reports that on March 15, 2001, it administratively approved, without modification, the Stipulated Settlement Agreement (Appendix C to the Settlement). On April 4, 2001, the KCC filed a motion to lodge the Order Approving Stipulated Settlement Agreement it issued on March 29, 2001, in KCC Docket No. 99-GIMG-068-CIG.

KGS, IP and Williams contend that TPI totally misrepresents the Settlement. They note that the credit given to the producers is similar to that in other settlements and that interest is not entirely forgiven. They also assert that TPI's request for a technical conference should be summarily dismissed because it is unnecessary. Williams also refutes TPI's claims that TPI did not receive the information it requested from Williams. Williams states that it gave TPI every item of requested information and spent a great deal of time answering TPI's questions about the information and about the Settlement.

In response to TPI's question about allocation procedures, Williams asserts that the allocations are a product of lengthy negotiations among parties with divergent interests and the customer class allocations are one aspect of a delicate balance reached by the parties after lengthy,

20. KGS corrects the amount of interest to which Mobil will be entitled to receive when Mobil's overpayments are refunded.

difficult negotiations. Williams maintains that TPI's claims concerning the allocation to customers is focused on the KCC Stipulated Settlement since TPI is a non-jurisdictional direct-sale customer of Williams. Williams concludes that TPI's concerns are raised in the wrong forum since the KCC is the appropriate regulatory agency.[21]

In addition, in response to MoPSC, Williams revised the settlement to correctly reflect the refund situation of Greeley Gas Company and the City of Liberal, Missouri. Williams states MoPSC concurs with the changes.

V. Discussion

The Commission approves the Settlement as a reasonable means of resolving complicated *ad valorem* tax refund matters currently before the Commission. It has long been recognized that an agency's authority to approve settlements is an essential regulatory tool,[22] and that the wide discretion afforded in this area is supported by the broad public interest favoring the settlement of complex matters.[23] Settlement procedures provide the opportunity to eliminate the need for more lengthy proceedings, either formal or informal, when

21. Williams notes that the KCC's approval of the Stipulated Settlement Agreement on March 15, 2001, left for later resolution the questions associated with a distribution to TPI.

22. Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1246 (D.C. Cir. 1972) (*Pennsylvania*).

23. Southern Union Gas Co. v. FERC, 840 F.2d 964, 971 (D.C. Cir. 1988).

the parties reach an agreement on the issues and if that agreement is compatible with the public interest.[24]

The Settlement is supported by most active parties in the states of Kansas, Oklahoma, Texas, Nebraska and Colorado. The benefits of the Settlement extend beyond the relief granted therein, to further facilitating a comprehensive resolution to all issues and mitigation of administrative burdens. Approval of the Settlement will bring substantial relief to many consumers.

Moreover, as clarified by the Sponsoring Parties, the Settlement is entirely voluntary. It does not impose any resolution on any non-consenting first seller or potential refund recipient. Any non-consenting party is free to continue to litigate its refund obligation or entitlement to refunds. Therefore, our approval of the Settlement for those parties who choose to be bound by its terms does not adversely affect any other parties.[25]

In light of these considerations, we find that approval of the Settlement is in the public interest since it avoids administrative burdens that would be imposed on all parties in resolving the remaining refund claims. We are also hopeful that all of the remaining disputes on the Williams system will be resolved through settlements in the near future.

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24. *Pennsylvania*, 463 F.2d at 1247.

25. Arctic Slope Regional Corp. v. FERC, 832 F.2d 158, 164 (D.C. Cir. 1987) (Severance of a contesting party and approval of a settlement for the consenting parties is within the Commission's broad discretion in adopting appropriate procedures for contested settlements).

Appendix A

In response to MoPSC and CU, we understand, as the Sponsoring Parties do, that the rights and claims of a Non-Settling Non-Producer Party are not compromised by the Settlement. Therefore, there is no need to modify the Settlement to further clarify that MoPSC and the customers it regulates will not be affected by the Settlement.

We also find that CU's notice to opt out is adequate to protects its jurisdictional and non-jurisdictional refund claims. However, since CU's nonjurisdictional refund claims involve direct sales that are not within our jurisdiction, CU must pursue those claims in an appropriate forum. Likewise, any claims that TPI may have against Williams for refunds as a result of its direct sales purchases from Williams must be pursued in an appropriate forum.

We deny MGUA's request to direct refunds to be paid in trust or to certain former customers directly. To the extent that MGUA's members were customers of Kansas LDCs and are concerned about what portion of the LDC's refunds are flowed through to them, we have held that the distribution of refunds by an LDC is a matter within the purview of state and local regulatory authorities.[26] Further, even if MGUA members were direct customers of Williams during the relevant time period, the Commission also lacks jurisdiction with respect to Williams' direct sales since the Commission's jurisdiction extends to sales for resales. Therefore, MGUA's members who were direct sales customers of Williams must pursue refunds in a different forum.

26. See Northern Natural Gas Co., 93 FERC ¶ 61,311 (2000); Colorado Interstate Gas Co., 93 FERC ¶ 61,185 (2000); Columbia Gas Transmission Corp., 31 FERC ¶ 61,307 at 61,686 n.38 (1985).

Appendix A

We will deny TPI's request to suspend our consideration of the Settlement pending a technical conference. The refund credit provided in the Settlement is identical to the credit in other settlements we have approved and interest has not been waived. We fail to see what additional information or explanation is necessary for us to fully understand the Settlement.

The Commission orders:

The Settlement filed February 23, 2001, as amended on March 22, 2001, is approved.

By the Commission.

(SEAL)

David P. Boergers,
Secretary.

APPENDIX B — ORDER DENYING REHEARING ISSUED JUNE 11, 2001

UNITED STATES OF AMERICA 95 FERC ¶ 61,366
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP98-52-041

Before Commissioners: Curt Hébert, Jr., Chairman
William L. Massey, Linda Breathitt, and Pat Wood III.

Williams Gas Pipelines Central, Inc.

ORDER DENYING REHEARING

(Issued June 11, 2001)

On April 12, 2001, the Commission approved a Settlement Agreement (Settlement) involving the refund of Kansas *ad valorem* taxes.[1] The Settlement is a partial resolution of *ad valorem* tax refund claims asserted by Williams Gas Pipelines Central, Inc. (Williams) that were not resolved by a previous settlement that resolved other *ad valorem* tax refund claims made by Williams. Midwest Gas Users' Association (MGUA) filed a request for rehearing. For the reasons set forth the Commission denies rehearing.

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1. 95 FERC ¶ 61,055 (2001).

Appendix B

Background

In *Public Service Company of Colorado v. FERC* (*Public Service*)[2] the Court upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices under the Natural Gas Policy Act (NGPA), and ordered first sellers/producers to make refunds of reimbursements they had received from pipelines for certain *ad valorem* taxes. On September 10, 1997, the Commission issued an order (Procedural Order) implementing the *Public Service* decision.[3] The Procedural Order established procedures and timetables for producers to make refunds to the pipelines and for the pipelines to flow the refunds through to their customers.

In accordance with procedures established by the Commission, Williams sought refunds from 652 operators and working interest owners (WIO). Many of the parties from whom Williams sought refunds disputed Williams' claims, and/or sought relief in formal proceedings filed with the Commission. In an effort to resolve these matters, representatives of the

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2. 91 F.3d 1478 (D.C. Cir 1996), *cert. denied*, 520 U.S. 1224 (1997).

3. Public Service Co. of Colorado, *et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998). The Court affirmed the Commission in *Anadarko Petroleum Co. v. FERC*, 196 F.3d 1264, *reh'g*, 200 F.3d 867 (D.C. Cir.), *cert. denied*,147 L Ed.2d 248 (June 6, 2000). The Court remanded one issue concerning the starting date for refunds, and the Commission issued an order addressing the remand, Public Service Company of Colorado, 91 FERC ¶ 61,025, *reh'g denied*, 93 FERC ¶ 61,264 (2000), *appeal pending sub nom*, Atlantic Richfield Co. v. FERC, No. 01-1065 (D.C. Cir. filed Feb. 9, 2001).

various interests involved in the proceeding participated in extensive settlement discussions that led to the filing of the previous settlement, which the Commission approved on October 11, 2000.[4] That settlement eliminated the claimed refund obligations of 636 of 652 working interest owners that Williams had identified as having refund obligations.

The settlement we approved on April 12 resolves some of the remaining outstanding refund claims in this proceeding. Since the Settlement is fully described in the April 12 order, we will only describe here those portions of the Settlement relevant to the issues raised on rehearing. The Settlement, along with a Stipulated Settlement Agreement filed with the KCC (and attached to the Settlement as Appendix C), resolves all issues between the Settling Parties, but will not affect claims among non-Settling Parties. Williams' jurisdictional customers in Missouri are among the non-Settling customers.

Article VI of the Settlement sets forth an agreed-upon allocation of Williams' ad valorem tax refunds related to the interests of Williams' settling customers in states other than Missouri (non-Missouri refunds). Article VI provides that 68.653 percent of the non-Missouri refunds will be allocated to Kansas jurisdictional customers as a group and 16.655 percent will be allocated to Kansas non-jurisdictional customers as a group.[5] The remaining non-Missouri refunds are allocated to Oklahoma, Nebraska, Texas, and Colorado

4. 93 FERC ¶ 61,030 (2000).

5. The Kansas jurisdictional customers are customers to whom Williams made sales for resale. The Kansas non-jurisdictional customers are customers to whom Williams made direct sales.

jurisdictional customers. Article VI further provides that the amounts allocated to the various jurisdictional groups shall be distributed among the customers in each group based on the percentage allocations set forth in Appendix B to the settlement. The percentage allocations in Appendix B are based on each customer's proportionate share of Williams total sales to that customer's jurisdictional group during the refund period.

Attached to the settlement is a so-called "Stipulated Settlement Agreement," approved by the KCC. The Stipulated Settlement Agreement provides for how the 16.655 percent of the non-Missouri refunds which the Settlement allocates to Kansas non-jurisdictional customers will be allocated among those customers.[6]

MGUA filed objections to and comments on the proposed settlement. MGUA asserted that during the relevant refund period, its members were customers of Williams and its predecessors under Rate Schedules C and I, purchasing approximately 30% of the total volumes sold by Williams during that period and paying approximately 30% of the total volumetric overcharges on the Williams system. MGUA

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6. Williams is one of the interstate pipelines involved in a proceeding before the Kansas Corporation Commission (KCC) in Docket No. 99-GIMG-068-GIG that pertains to Kansas non-jurisdictional *ad valorem* tax refunds. The KCC reported that on March 15, 2001, it administratively approved, without modification, the Stipulated Settlement Agreement (Appendix C to the Settlement). The Commission has not passed on the Stipulated Settlement Agreement, since it involves direct sales, a matter outside the Commission's jurisdiction.

protested that the Settlement does not give assurance to Kansas ratepayers that they will ultimately receive their appropriate share of refunds. MGUA stated that to assure Kansas ratepayers that they will receive their appropriate share of refunds, the Commission should not approve the Settlement without a condition requiring Williams to make payments to: (1) Midwest in trust for payment to its members, (2) Local Distribution Companies (LDCs) in trust for distribution to the ultimate customer based on class usage during the pertinent period, and/or (3) the former customers directly.

The State of Kansas and the Kansas Corporation Commission (collectively, the KCC), Kansas Gas Service (KGS), and UtiliCorp United (UtiliCorp) filed answers to MGUA's objection. KCC maintained that MGUA members did not purchase gas directly from Williams, but from Kansas LDCs.[7] KGS, an LDC, stated that all the MGUA members did not purchase directly from Williams, but rather through KGS. Williams sold the gas to KGS, and KGS then resold the gas to the MGUA members. KCC, KGS, and UtiliCorp accordingly asserted that MGUA's concerns relate to how local distribution companies will distribute their refunds to their customers and that such matters are beyond the Commission's jurisdiction and are reserved to the KCC. The KCC also disputed MGUA's allegation that the KCC and its Staff misstated their position, noting the KCC represents a myriad of interests, which means that every resolution determined by the KCC may not represent each party's optimal outcome.

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7. Reply Comments of Williams ¶13 at 7, and Reply Comments of KGS ¶7 at 5.

Appendix B

MGUA did not dispute the accuracy of the facts set forth in the reply comments of Williams and KGS concerning the gas purchases by MGUA members. In Appendix B, the amount of Kansas sales attributable to KGS is almost 80% of Williams' sales in the state of Kansas and almost 30 percent of Williams' total sales during the refund period. That is consistent with the assertion that purchases by MGUA members are included in the amount of jurisdictional sales in Kansas.

The Commission approved the Settlement, and denied MGUA's request to direct refunds to be paid in trust or to certain former customers directly. The order stated that to the extent that MGUA's members were customers of Kansas LDCs their concern about what portion of the refunds going to the LDCs are flowed through to them is a matter within the purview of state and local regulatory authorities, not the Commission.[8] Moreover, it stated that even if MGUA members had been direct customers of Williams, the Commission lacks jurisdiction with respect to refunds relating those direct sales since the Commission's jurisdiction extends only to sales for resale.

The Request for Rehearing

MGUA's request for rehearing reiterates the same grounds that it urged in objecting to the settlement. In essence it claims that the Commission should not have approved the

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8. The order cited Northern Natural Gas Co., 93 FERC ¶ 61,311 (2000); Colorado Interstate Gas Co., 93 FERC ¶ 61,185 (2000); Columbia Gas Transmission Corp., 31 FERC ¶ 61,307 at 61,686 n.38 (1985) (*Columbia Gas*).

settlement because the KCC may order a distribution of the refunds that does not reflect the amount of overcharges each customer paid. Although MGUA asserts again, that for the relevant period, its members were purchasers of natural gas under Williams' Rate Schedule C and Rate Schedule I, it also refers to its members' interests in the refunds as that of "ratepayers who were former indirect sales customers."[9] MGUA contends that these customers purchased roughly 30 percent of the total volumes of gas sold during that period by Williams or its predecessor. Accordingly, MGUA asserts that these customers, paid roughly 30 percent of the Kansas *ad valorem* overcharges pertinent to the Williams system and should receive that amount of the refunds. Instead, the KCC is considering the distribution of the refunds in a manner that will not give the MGUA members their fair share of the refunds. MGUA contends that the Commission erred in deferring to the KCC to make distribution of refunds to consumers in the State of Kansas because it states the KCC had incorrectly represented its status as a consumer representative.

MGUA further contends that the Commission has not followed the Court's remand that the refunds are to be directed to the consumers that paid the overcharges. MGUA asserts that the Commission should have adopted the modifications to the settlement that MGUA had proposed. Finally, MGUA argues that the Commission should have required the parties to reopen the negotiations where the interest of the ultimate consumers would in fact be represented.

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9. Rehearing at 3-4.

Appendix B

Discussion

On rehearing, MGUA does not dispute how the refunds will be allocated to the various customer classes under the provisions of Article VI of the Settlement which establishes the percentages of the non-Missouri refunds to be allocated to each Kansas jurisdictional customer served directly by Williams. Nor does MGUA attack the Stipulated Settlement Agreement that involves the refunds going to Kansas non-jurisdictional customers.[10] Rather, MGUA's concern is how the refunds the Settlement allocates to the jurisdictional customers served directly by Williams are to be distributed to those customers' ratepayers in Kansas, who include the MGUA members.

MGUA argues that the Commission erred by failing to "adequately address the interests of ratepayers who were former indirect sales customers" of Williams, which "deprives these consumers of their refunds in violation of law."[11] The crux of that concern is the KCC's "recent decision to confiscate the *ad valorem* refunds of all Kansas consumers and divert them to selected low income customers in amounts that will exceed even the KCC's own Staff's evidence of

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10. None of the members listed by MGUA are included in the list of Kansas direct customers in the Stipulated Settlement Agreement. As a result, the volumes purchased by MGUA's members from LDCs are included in the jurisdictional sales volumes on Appendix B to the Settlement, which details how the refunds will be distributed.

11. Rehearing at 3-4.

need." [12] That concern is not a basis to deny approval of the Settlement which resolves the amounts that were collected in excess of the maximum lawful price, and how the refunds will be distributed to various customer classes.

The Commission's orders, starting with the *Colorado Interstate Gas Company* order[13] have, consistent with the court remands, required interstate pipelines to "pass through any *ad valorem* tax refunds they received from first sellers" to the "customers who overpaid the pipelines." [14] Those are the customers of Williams who purchased the gas from Williams. The court never required that the Commission mandate that the refunds go to the ultimate consumer. In *Public Service* the court approved the Commission's refund procedures.[15]

How the customers of the pipeline who receive the refund from the pipeline, mainly LDCs, flow through the refund to their customers is within the purview of the state regulatory bodies, such as the KCC. The Commission has no jurisdiction to dictate how that should be done. Thus, MGUA's allegations concerning the KCC's conflict of interest, which MGUA has not established, have no relevance to whether the Commission should approve the Settlement. For MGUA members who purchased gas from LDCs, the forum for

12. Rehearing at 8.

13. 65 FERC 61,292 (1993).

14. 65 FERC at 62,374.

15. 91 F.3d at 1491.

presenting their argument that they should receive refunds in the same proportion as their purchases of gas is at the KCC,[16] not the Commission. As the Commission has stated:

We note that we cannot provide specific refunds to PGC or any other customer served by a distributor-customer of Columbia. We lack jurisdiction over the rates charged by local distribution customers. Charges and refunds by local distribution companies are within the purview of state and local regulatory authorities. Natural Gas Act, 15 U.S.C. § 717(b)(1982).[17]

Accordingly, since MGUA does not contend that the Settlement itself is flawed, but only objects to how the KCC may treat the refunds received under the Settlement, a matter over which this Commission has no jurisdiction, we will deny rehearing.

The Commission orders:

The request for rehearing is denied.

By the Commission

(SEAL)

David P. Boergers,
Secretary.

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16. Proceedings are pending in Kansas on the distribution of the refunds received by jurisdictional customers under the Settlement.

17. *Columbia Gas* 31 FERC at 61,686.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT GRANTING MOTION FOR SUMMARY AFFIRMANCE DATED AND FILED DECEMBER 7, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Rogers and Tatel, Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of the motion for summary affirmance, or in the alternative, to dismiss for lack of jurisdiction, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be denied. The Kansas Corporation Commission has already determined it will not grant petitioner the relief it desires. Because this court could redress petitioner's alleged injury if petitioner's claim on the merits is correct, petitioner has standing. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Military Toxics Project v. Environmental Protection Agency*, 146 F.3d 948, 953-54 (D.C. Cir. 1998). It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

Petitioner did not waive its argument that the Federal Energy Regulatory Commission has jurisdiction to grant petitioner its requested relief. Respondent correctly determined, however, that neither Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(b), nor the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*,

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

authorizes the Federal Energy Regulatory Commission to require the pass through of the Kansas *ad valorem* tax refunds to the ultimate consumers of natural gas. *See FERC v. Martin Exploration Management Co.*, 486 U.S. 204, 207 (1988) (Natural Gas Policy Act of 1978); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516-17 (1947) (Natural Gas Act).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/ JWR
[Judge Judith W. Rogers]

s/ DST
[Judge Tatue]

s/ SFW
[Judge Stevens F. Williams]

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING BY PANEL DATED AND FILED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users' Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Rogers and Tatel, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing filed January 17, 2002, and the supplement thereto, it is

Appendix D

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: s/ Michael C. McGrail
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel and Garland,* Circuit Judges; Williams, Senior Circuit Judge

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* Circuit Judges Henderson and Garland did not participate in this matter.

Appendix E

ORDER

Upon consideration of petitioner's petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: s/ Michael C. McGrail
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 22 2002
OFFICE OF THE CLERK

No. 01-1692

IN THE
SUPREME COURT OF THE UNITED STATES

MIDWEST GAS USERS' ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT, WILLIAMS GAS PIPELINES CENTRAL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gary W. Boyle
Counsel of Record for Respondent
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RESPONSE TO PETITIONER'S QUESTION PRESENTED

Petitioner's statement of the Question Presented is inconsistent with Rule 16(2) of the Rules of the Supreme Court. Properly stated, the question presented by the Petition is:

Does FERC have the authority to direct the refund of prices paid for gas in transactions over which FERC had no jurisdiction?

RULE 29.6 STATEMENT

Respondent Williams Gas Pipelines Central, Inc., is wholly owned by Williams Gas Pipeline Company, LLC. Williams Gas Pipeline Company, LLC is owned by The Williams Companies, Inc.

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Appendix A - *Colorado Interstate Gas Company,* Docket Nos. GP83-11-002 and RI83-9-003, Order on Court Remand dated December 1, 1993. 1

Respondent, Williams Gas Pipelines Central, Inc., ("Williams"), hereby files its Brief in Opposition to Petitioner's Writ of Certiorari.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

A. This Case Is Not The Type Contemplated By Rule 10.

Petitioner purports to describe two reasons for granting the Writ. Petition for a Writ of Certiorari (hereinafter "Petition") at 8-9. Stripped down to their real substance, Petitioner's reasons are: (1) FERC's actions will redistribute millions of dollars from certain pipeline customers to other pipeline customers, and (2) FERC's actions will deny some retail gas customers in Kansas relief from prices in excess of the Maximum Lawful Price. Even if Petitioner's assertions are correct (which Williams denies) the stated reasons do not support granting the Writ.

Rule 10 of the Rules of the Supreme Court provides examples of the reasons that this Court may consider sufficiently compelling to support the granting of a Writ of Certiorari. Those relevant here include a conflict between the circuits on an important matter; a conflict between a circuit court of appeals and a state court of last resort on an important matter; a departure from the normal course so extraordinary that the Court must exercise its supervisory powers; and a decision of first impression or a decision in conflict with decisions of this Court on an important federal question.

This case does not fall within any of the Rule 10 categories and Petitioner has not articulated a basis on which the Court might reasonably conclude otherwise. Similarly, Petitioner has not articulated a basis on which the Court might conclude that the questions presented in this Petition are compelling for any other reason. Petitioner has failed to state a sufficient reason to grant the Writ probably because FERC's lack of jurisdiction over the transactions at issue here is well settled.[1]

Petitioner suggests that the Court of Appeals' decision is contrary to this Court's recent holding in *State of New York v. FERC*, 535 U.S. ____, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002). Petition at 14-16. That case, however, stands for the proposition that when an electric utility unbundles the electric commodity from the electric transmission service, FERC has the jurisdiction to require the utility to offer its transmission service to others on an open access basis. *Id.* 122 S. Ct. at 1016, 152 L. Ed. 2d at 54. While that proposition is also well settled with respect to FERC's jurisdiction over natural gas transmission, it has no relationship at all to the questions presented here. Contrary to Petitioner's assertion, this case concerns FERC's ability to control the sale of gas not in interstate commerce. It does not deal with open access to gas or electric transmission facilities and indeed has no relationship to transmission service at all. Accordingly, *State of New York v. FERC* is simply irrelevant to the issues presented in this case.

Petitioner's reliance on *FERC v. Martin Exploration Management Co.*, 486 U.S. 204 (1988) is also misplaced. In Martin, the Court held that FERC has the authority to set the rules under which gas would be categorized for the purpose of

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1 *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas*, 489 U.S. 493 at 525 (1989).

setting the NGPA Maximum Lawful Price while leaving to the states and other federal agencies the application of those rules. *Id.* at 213. That is exactly what FERC has done here. By approving the settlement in question, FERC has set the rules under which money will be passed to certain classes of customers. FERC properly left the application of its rules concerning distribution of those funds among classes of customers outside of its jurisdiction to the appropriate state regulatory agencies. FERC's approval of the settlement in this case is entirely consistent with *Martin* and does not warrant further review.

This case does not raise a conflict between the circuits or a circuit and a state court. Petitioner does not claim that this case presents a question of first impression. An examination of the Court's allegedly relevant decisions reveals that the Court of Appeals' decision is consistent with decisions of this Court. There is no claim of an extraordinary departure from the normal course. Perhaps most telling, the Petitioner has declined to argue that any of the questions presented here are important in the context of the Court's docket.[2]

Because the Petitioner has failed to articulate, in accordance with Rule 10, a compelling reason to grant the Writ, the Petition should be denied.

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2 Petitioner's request for a writ may be best explained by the fact that its filing delays the Effective Date of the Settlement, a fact which Petitioner apparently hopes will place additional pressure on the other parties to agree to an extortionate settlement of Petitioner's specious claims.

B. FERC's Jurisdiction With Respect To Distributions To Non-Jurisdictional Customers Is The Settled Law Of This Case.

Petitioner asks the Court to change FERC's position and direct FERC to control distributions of proceeds to retail customers in Kansas. Notwithstanding Petitioner's protestations, the distribution of the proceeds of Kansas *ad valorem* tax refunds is the well-settled law of this case and has not been properly preserved by any party for consideration here. FERC long ago established that it would not attempt to assert jurisdiction over the disposition of refunds attributable to non-jurisdictional pipeline customers and its initial decisions have been appealed without complaint. At this late juncture, this Court should not accept this "controversy" when Petitioner declined to seek review of FERC's prior decisions.

FERC first established a process for collecting and distributing refunds of Kansas *ad valorem* taxes collected in excess of the Maximum Lawful Price in *Colorado Interstate Gas Co.*, 65 FERC ¶ 61,292 (1993) (Appendix A). FERC directed pipelines who initially paid Kansas *ad valorem* taxes to producers to request a refund of the amounts so paid. *Id.* at 62,373 (Appendix A at 20). FERC also established the manner in which pipelines would pass through refunds to customers. *Id.* at 62,373-374 (Appendix A at 20-22). FERC established in 1993 that it would direct the pipelines to refund the jurisdictional portion of their collections but would not direct distribution by pipelines with respect to the non-jurisdictional portion of their collections. *Id.* at 62,374 (Appendix A at 21-22).

FERC's decision was thoroughly reviewed by the Court of Appeals for the District of Columbia Circuit. *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478 (1996), *cert. denied,*

520 U.S. 1224 (1997). Notwithstanding an opportunity to raise its arguments at that time, Petitioner declined to participate in that appeal and the Court declined to grant a Petition for Writ of Certiorari. Because Petitioner failed to challenge FERC's decision not to assert jurisdiction over the very refunds at issue here, the Court should not engage in a seriously delayed review now.

C. The Petitioner Has Other Adequate Remedies.

Petitioner bases much of its argument on the proposition that consumers of gas will be left with no adequate remedy (Petition at 18) unless this Court intervenes to dismantle a reasonable settlement of a regulatory proceeding entered into between properly motivated parties and approved by an agency with sufficient expertise to understand and to determine the propriety of a complicated and delicately balanced settlement. While it is clear that lack of a remedy is not a sufficient reason to support a Petition for a Writ of Certiorari, it is equally clear that Petitioner has other adequate remedies.

The settlement at issue in this case allocated a percentage of the proceeds from the refund of tax overcharges to Kansas Non-Jurisdictional Customers (Appendix A to Petition at 11a). Under the terms of the settlement, the ultimate distribution to the Kansas non-jurisdictional customers was left to the Kansas Corporation Commission (hereinafter the "KCC") (Appendix A to Petition at 13a-15a). Petitioner's sole objection is that the KCC will be free to distribute the Kansas non-jurisdictional portion of the refunds in a way with which the Petitioner disagrees (Petition at 6-8). The power to direct distribution of a portion of the settlement fund lies squarely with the KCC. If Petitioner is aggrieved by a KCC ruling, it

can pursue a remedy through the courts of Kansas and eventually, if appropriate, in this Court on a Petition for a Writ of Certiorari to the Supreme Court of Kansas. Petitioner makes no argument that it cannot avail itself of such an appropriate appellate process. For these reasons, Petitioner's claim of a lack of remedy is inaccurate and insufficient to support its Petition.

CONCLUSION

Petitioner's Writ does not present an issue appropriate for review by this Court pursuant to Rule 10. Additionally, the issues presented to this Court have previously been subjected to an exhaustive appellate process. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 22, 2002

APPENDIX

APENDIX A – ORDER ON COURT REMAND ISSUED DECEMBER 1, 1993

UNITED STATES OF AMERICA 65 FERC ¶ 61,292 FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: **Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.**

Colorado Interstate Gas Company

Docket Nos. GP83-11-002 and RI83-9-003

ORDER ON COURT REMAND

(Issued December 1, 1993)

On June 28, 1988, the United States Court of Appeals for the District of Columbia in *Colorado Interstate Natural Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988) (CIG) remanded to the Commission its decision in *Sun Exploration and Production Co. and Northern Natural Gas Co.* (Sun).[1] In Sun, the Commission held that the Kansas *ad valorem*[2] tax was similar to a severance tax, and thus qualified for reimbursement under section 110(a)(1) of the Natural Gas Policy Act of 1978 (NGPA). The Commission now reverses its decision in Sun, concludes that the Kansas *ad valorem* tax does not qualify under

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1 36 FERC ¶ 61,093 (1986); *reh'g denied, Northern Natural Gas Co.*, 38 FERC ¶ 61,062 (1987).

2 See appendix.

under section 110(a)(1) of the NGPA, and orders refunds consistent with this order, effective as of the date of the court's decision.

Introduction

In 1974, in Opinion No. 699, the Commission set a uniform national rate under the Natural Gas Act for producer sales of gas, which could be increased to recover "State production, severance or similar taxes."[3] In Opinion No. 699-D, the FPC held that any State *ad valorem* tax that was "based on production factors" was a "similar tax" which could be added to the national rate.[4] In response to a specific request for a ruling on the eligibility of the Kansas *ad valorem* tax, the FPC held the tax qualified because "the bulk of the Kansas *ad valorem* tax is based upon production factors."[5] The FPC went

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3 Just *and Reasonable National Rates for Sales of Natural Gas,* Opinion No. 699, 51 FPC 2212, 2301-2, reh'g denied in relevant part, 52 FPC 1604 (1974), aff'd sub nom., *Shell Oil Co. v. FPC,* 520 F.2d 1061 (5th Cir. 1975), reh'g denied, 525 F.2d 1261 (5th Cir.), cert. denied sub nom. *California Co. v. FPC,* 426 U.S. 941 (1976).

4 See generally, Opinion No. 699-D, *Just and Reasonable National Rates for Sales of Natural Gas,* 52 FPC 915 (1974), and *Mobil Oil Corp.,* 55 FPC 917 (1976).

5 On December 31, 1975, the Commission set a national rate for gas flowing in interstate commerce prior to January 1, 1973 and continued to permit reimbursement of "State . . . production, severance, or similar taxes." Just *and Reasonable National Rates for Sales of Natural Gas,* 54 FPC 3090, 3124 (1975), reh. denied, 56 FPC 303 (1976), *aff'd in relevant part sub nom. Tenneco Oil Co. v. FPC,* 571 F.2d 834 (5th Cir.), *cert. denied,* 439 U.S. 801 (1978). In updating national rates for the 1975-76 period, the Commission adhered to its standard for tax reimbursement. *National Rates for Jurisdiction Sales of Natural Gas,* 56 FPC 509, 591, *reh. denied in relevant part,* 56 FPC 3698, 2807 (1976), *aff'd sub nom., American Public Gas Ass'n v. FERC,* 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 907 (1978).

on to explain that other states' taxes also could similarly qualify because they were taxes "on the amount of production and the revenues therefrom." However, on March 1, 1976, the FPC held that the Texas *ad valorem* tax was not a production, severance, or similar tax.[6] The FPC explained that although annual and future production of gas was used to determine the value of the gas property being taxed, "the tax itself does not depend on production" but rather "depends on the value of the remaining recoverable reserves."[7] The FPC noted that under the Texas tax "a gas property which had no production at all during a tax period due to a temporary shut-down would still have value and would incur tax liability in the period on that basis."[8]

The NGPA, enacted effective December 1, 1978, set maximum lawful prices (MLP) for the first sale of certain categories of natural gas. Under NGPA section 110(a)(1), the first sale price could exceed the MLP to the extent necessary to recover "State severance taxes attributable to the production of such natural gas."[9] The NGPA defined "State severance tax," as "any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas."[10] The Conference Report accompanying the NGPA stated that the term "State severance tax" is to be "construed broadly" and includes "any

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6 *Mobil Oil Corp.*, 55 FPC 917 (1976) (Mobil).

7 *Id.* at p. 918.

8 *Id.* at p. 918.

9 15 U.S.C. §§ 3320(a).

10 15 U.S.C. §§ 3320(c).

tax imposed upon mineral or natural resource production including an *ad valorem* tax or a gross receipts tax."[11]

On January 11, 1983, Sun Exploration and Production Company (Sun) petitioned the Commission to issue a declaratory order, retroactive to December 1, 1978, asserting that the Texas *ad valorem* tax is a reimbursable severance tax under section 110. Subsequently, on August 22, 1983, Northern Natural Gas Company (Northern) petitioned the Commission to rescind the holding in Opinion No. 699-D that the Kansas *ad valorem* tax is reimbursable under section 110.[12] On July 23, 1986, the Commission issued the order in Sun dealing with both petitions and denying them both on the merits.[13] Although the Commission observed that both the Kansas and Texas taxes were defined by statute as property taxes levied upon the fair market value of remaining recoverable reserves at the time of the assessment, the Commission found that the two taxes differed in "the degree to which production factors are taken into account." The Commission found that the Kansas methodology differed from the Texas methodology insofar as "actual current or prior-years' production volumes or the revenues derived therefrom are a significant factor in the formula used to determine the Kansas tax."[14] The Commission found that the Texas methodology only uses actual production to establish the rate of production decline for projecting future production and estimating

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11 S. Rep No. 95-1126, 95th Cong. 2d Sess. at p. 91.

12 Numerous parties intervened, including Colorado Interstate Gas Co. (CIG), which supported Northern's petition.

13 The court upheld the Commission's refusal to dismiss the petitions on grounds of res judicata. 850 F.2d at p. 772.

14 36 FERC ¶ 61,093, at p. 61,224 (emphasis in original).

remaining reserves. Further, the Commission reasoned, Texas has long assessed both a severance tax and an *ad valorem* tax, indicating that Texas considered the taxes to be separate and distinct. The order also rejected the argument that the Texas tax should qualify because of the statement in the Conference Report accompanying the NGPA that the term "State severance tax" is to be construed broadly. The Commission stated that the tax still must be "upon . . . . production."[15] Finally, the Commission rejected Northern's various arguments that the Kansas *ad valorem* tax is a property tax.

Northern and CIG filed requests for rehearing regarding the portion of the July 23, 1986, order addressing the Kansas tax. No party filed for rehearing of the Commission's ruling on the Texas tax. On January 28, 1987, the Commission denied rehearing on the same grounds as stated in the July 23, 1986, order.[16] Northern and CIG then sought court review of the Commission's ruling that the Kansas tax qualified under NGPA section 110.

In reviewing the Commission's orders, the court rejected each of the Commission's arguments justifying its decision. The court noted that "a tax nominally on property may be functionally identical to a production tax. "[17] However, the court held that to find a tax was similar to a production tax, it would not be sufficient to merely find, as the Commission did, that the "bulk of the Kansas tax is based upon production factors." Rather there had to be a systematic analysis of any tax "by reference to [a] cogent theory of what makes a tax 'similar'

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15 36 FERC ¶ 61,093, at p. 61,224.

16 *Northern Natural Gas Co.*, 38 FERC ¶ 61,062 (1987).

17 850 F.2d at p. 772.

to a production or severance tax under §§ 110."[18] In particular reference to the Kansas tax, the court noted that the Commission had not identified those features that it believes constitute the production "bulk," much less the features excluded from the bulk. The court explained that in Kansas the ultimate tax on equal production may vary nearly by a factor of ten "because production is capitalized by multiplying by a present worth factor."[19]

The court also was unpersuaded by the Commission's reasons for treating the Kansas and Texas taxes differently since it found that both statutes assessed the cash market value of remaining recoverable reserves. Accordingly, the court remanded the case to the Commission for an analysis "to identify the features of the Kansas tax that point toward one classification or another, and to offer sensible distinctions between taxes that it chooses to treat differently."[20]

KCC Motion to Reaffirm

On January 31, 1989, KCC filed a motion requesting the Commission to reaffirm its 1987 Sun decision.[21] The KCC

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18 *Id.* at p. 773.

19 *Id.* at p. 771. The Court noted that the present worth factors in Kansas incorporate several assumptions including: an assumed discount rate, expectations as to future price changes, assumptions about rates of decline in production, and the probable length or production

20 *Id.* at p. 775. The court noted that with the gradual elimination of federal regulation of natural gas prices, any change by the Commission could be of limited relevance. Since the court's decision, as a result of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L.101-50, 103 Stat. 158, as of January 1, 1993, there no longer is any price regulation of natural gas.

21 Attached to the KCC motion was the affidavit of Mr. Timothy N. Hagemann, a Kansas certified County Appraiser, which described how the ad

argues that in its practical operation, the Kansas *ad valorem* tax is similar to a severance or production tax and should qualify under section 110. Kansas asserts that although nothing in the public record reflects the precise source of the language adopted in section 110 of the NGPA, it is reasonable to assume that the Conference Committee accompanying the NGPA meant to adopt the policy of the FPC -- permitting Kansas producers to collect the *ad valorem* tax. The KCC asserts that a tax is "similar" to a severance or production tax under section 110 of the NGPA if the tax varies with the amount of natural gas produced.

The KCC states that a property's fair market value varies directly with the amount of gas produced from wells on the property and all other things being equal, a well that produces more gas than a neighboring well in the same field will be appraised at a higher value than the other well. Since the tax in Kansas is proportional to production, the Sun decision, that the Kansas tax is similar to a production tax, should be affirmed. KCC argues that to deny reimbursement of the tax would operate as an economic disincentive to production of natural gas.

CIG's Answer

On March 1, 1989, CIG filed an answer to the KCC motion to reaffirm.[22] CIG argues that the Kansas *ad valorem* tax is not assessed primarily on the volume or value of current production and does not constitute a production, severance, or similar tax under section 110 of the NGPA. CIG asserts that

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valorem tax operated in Kansas.

22 Northern filed an answer opposing KCC's motion for the reasons set forth by the court in CIG, and by CIG in its answer.

the KCC's position -- that a tax is similar to a severance or production tax if it varies with the amount of natural gas produced -- is no more cogent than the arguments presented by the Commission and rejected by the court in CIG. CIG argues that, under section 110, Congress intended that only taxes and certain other specific costs which are directly related to the volume and value of gas currently produced would be reimbursable such as the other NGPA section 110 costs (i.e., gathering, compression, treating, etc.) which are volumetrically related to the gas produced and sold. CIG asserts that the Kansas *ad valorem* tax is not assessed on the value of the gas sold and produced in any particular year, but instead is assessed on the value of the gas remaining in the reservoir after each year's production is removed.

CIG further states that in defining severance taxes, Congress used the words of the FPC's Opinion No. 699, but added the phrase "imposed on the production of natural gas." (CIG pet. at p. 13). CIG argues that where a tax is not imposed on production, but instead on the leasehold property, like the Kansas *ad valorem* tax, Congress did not intend that such a tax would be reimbursable. CIG contends that although production plays a role in the assessment of the Kansas *ad valorem* tax, it is not a determinative role. To establish that production is not the determining factor in the tax, CIG points out that two wells in different fields producing equal amounts of natural gas can generate different amounts of tax because the *ad valorem* tax uses a Present Worth Factor[23] in calculating the tax assessment. CIG argues that the KCC has focused on the operation of the Kansas tax within a given field, which conceals the true nature of the tax. While at the "microscopic"

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23 As described in the Hagemann affidavit, the Present Worth Factor is a complex mathematical function of time, anticipated price escalation, time value of money, discount rate, and a production decline rate.

field level the tax appears to be one based primarily on the value of production, when examined at the state-wide, "macroscopic" level, as the tax is assessed in the various Kansas producing fields, the full nature of the tax emerges. CIG asserts that when viewed from both perspectives, it is clear that the tax fails to resemble a production or severance tax.[24]

Other Pleadings

On August 5, 1993, Missouri Public Service Commission (Missouri), and Southern Union Gas Company (Southern)[25] moved to intervene out of time, and filed a joint motion for summary reversal of the Commission's determination that Kansas' tax was similar to a production tax. On August 20, 1993, four natural gas producers, who had previously filed in support of KCC's motion, filed an answer opposing the joint motion, and urged the Commission to reaffirm its prior rulings on the Kansas tax.

Discussion

A. *Qualification of the Kansas Ad Valorem Tax under Section 110*

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24 CIG states that the Commission should not act without a full record and suggests that the Commission establish procedures to develop such a record. On April 14, 1989 the KCC responded to CIG's Answer by arguing that the interpretation of section 110 and the inferences that may be drawn from the operation of the Kansas tax call for legal analysis and not a factual evidentiary hearing, and submitted additional affidavits confirming that the description of the tax in the Hagemann affidavit was correct. (KCC motion to Lodge at p. 2.).

25 Each claimed that it was involved in current proceedings which are dependent on the outcome of this proceeding. The Commission finds that good cause has been demonstrated and grants intervention under Commission rule 214(d)(1), 18 C. F. R. § 385.214(d)(1)(1993).

Although there are various types of taxes that producers pay, such as real estate taxes, personal property taxes, sales taxes, income taxes, excise taxes, and so forth, section 110 of the NGPA only permits the reimbursement of "State severance taxes borne by the seller" in addition to the ceiling price. These allowed taxes, in turn, are defined by the NGPA as "any severance, production, or similar tax." Other taxes are costs of doing business that the producer was to recover by the collection of the ceiling price. As clarified further in the legislative history, "State severance tax" is a statutory term of art that "includes any tax imposed upon mineral or natural resource production including an *ad valorem* tax or a gross receipts tax" and is to be "broadly construed."[26] Upon reconsideration of the Kansas *ad valorem* tax in light of the language of the NGPA, the court's decision, and the facts of this case, including the text and application of the Kansas statute, the Commission finds that the tax does not qualify under section 110(a)(1) of the NGPA. The Commission finds that, for reasons as argued by CIG and Missouri, and as clarified further below, the Kansas *ad valorem* tax is not similar to a severance tax and is, instead, a non-qualifying personal property tax.

1. Standards for Analyzing the Kansas Ad Valorem Tax

The Commission in Sun applied the standard that the Kansas tax qualified under NGPA section 110 because "actual current or prior-years' production volumes or the revenues derived therefrom are a significant factor in the formula used to determine the tax."[27] This standard appears to be a refinement

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26 H.R. Cong. Rep. No. 95-1752, 95th Cong. 2d Sess. 91 (1978), 1978 U.S. CODE Cong. and Ad News 8983, 9007.

27 36 FERC ¶ 61,093, at p. 61,224.

of Opinion No. 699-D's broader statement that, to be deemed similar to a severance tax, the "bulk of the tax" must be based on "production factors." On review of these standards, we find that they are too vague and subjective, and improperly permit property taxes on the present value of reserves and lease properties in the state to qualify. Past or current production volumes and revenues are indeed "production factors" but they are factors that are used in judging the present value of all estimated future production from a lease or well.[28] Since the resulting valuation is of the remaining reserves, a tax on that value is a property tax and cannot qualify for reimbursement under section 110. Further, it is not feasible to establish any precise standard for deciding whether production is significant enough in the calculation of the Kansas *ad valorem* tax to qualify its bulk as being similar to a severance tax. Accordingly, we will not attempt to apply those standards here and, as directed by the court, will clarify the standard for analyzing whether the Kansas *ad valorem* tax qualifies under section 110.

At the outset, we believe that section 110's allowance for taxes "similar" to severance taxes was meant to reflect Congress' intent that the substance of the tax, and not its mere label, be dispositive of the issue. Thus, the fact that the subject Kansas tax is titled as an *ad valorem* tax is of no importance to the resolution of the issue here. However, by the same token, we believe that the substance of the tax must fit some common, historical definition of a severance tax. By Congress' own definition, such a tax must be "upon" gas production or the value thereof and not, for example, on personal property. It is

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28 The fact that current producing rates may be one factor considered in valuing the fair market value of a gas producing property merely reflects the fact that potential purchasers of such a property will naturally value it greater if it is producing high volumes of gas. In such cases, the cashflow from the property is a known fact and the investors can expect to recover their investment more quickly than if daily production is low.

the tax basis -- current production or personal property -- that dictates whether the Kansas *ad valorem* tax qualifies under section 110.

Accordingly, to be deemed "similar to" a severance tax, a tax must have the substantive characteristics of a severance tax, and not a property tax. There are two essential characteristics of a severance tax. First, a severance tax is a tax on the act of severing, i.e., removing, a commodity from the earth. A severance tax is on the volume or value of the commodity removed, as assessed at the time of removal. A property tax is on the value of assets remaining in or on the earth at the time of the assessment. Thus, as relevant here, a gas severance tax is on the volume or value of the gas the moment it is produced; a property tax on gas leases or wells is on the value of the gas remaining in the ground as well as on the value of wells and other production assets on the lease, at the time of the tax assessment.[29]

Second, a severance tax in its purest sense is a tax on each Mcf or MMBtu of gas production, or the value thereof, at the time of production, although the state may bill the tax on a monthly or annual basis or may use some form of averaging of the production over the tax period.[30] The key point is that

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29 The value of such production, in turn, is a direct function of the volumes produced and the price obtained for the gas, but may also reflect a netting out of the producer's cost of production, gathering or other factors. If there is no sale of the gas production, as in the case of gas used for gathering system fuel, or if the sale is at a location other than the wellhead, some states may require some sort of wellhead market value price be imputed to the gas for the purpose of the severance tax.

30 Thus, a tax on average or total production or production revenue over a current tax period, such as a tax year, could qualify as a severance tax since it is a surrogate for assessing the tax on each Mcf or MMBtu produced, or the revenue therefrom, during that period. As the court in CIG noted:

each time a single unit of gas is produced (i.e., "severed from the earth"), and only at that time, a severance tax liability arises directly proportional to the price and/or volume of the gas produced. There is a discrete event that triggers the severance tax liability -- the production of a unit of gas. And, once the unit of gas is produced and the severance tax is applied to it, that unit of gas is never again subject to the severance tax. On the other hand, a property tax on gas leases and wells can be on what an assessor estimates as the net present value of all expected future production from the lease or wells, and may reflect all future expected costs and prices, as well as future depreciation, salvage value of facilities and so forth and will be based, in part, on current and historical costs and production data. Further, and unlike a severance tax, a property tax is applied to a unit of gas reserves each year -- year after year -- until that unit of gas finally is produced and removed from the property being valued.

2. Application of Principles to the Kansas Ad Valorem Tax

Applying these common, historic principles to the Kansas *ad valorem* tax, we find that it is a tax on property, not on production, and, therefore, does not qualify for reimbursement under section 110.[31] On its face, and as applied

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> If a state sought to capitalize the annual production (or revenue) enjoyed by each producer by multiplying it by a single fixed figure, the tax would plainly be similar enough to a production tax to qualify under § 110. CIG at p. 779 However, the Court specifically held that neither Texas nor Kansas does that. Id.

31 In this regard, we find that Kansas' own section 79-4217, which is described as an excise tax on the "gross value" of gas "severed from the earth," fits exactly the definition of an eligible "State severance production, or similar tax." The Kansas severance tax, Kansas Stat Ann.79-4217, provides, in pertinent part, as follows:

> Mineral severance tax; imposition of tax; rate; measurement

by the state appraisers,[32] the Kansas *ad valorem* tax statute establishes a tax on the present value of personal property. Past and current production is used to estimate future, total production capability of the lease or well which, in turn is used to assess the present value of the gas reserves at the time of the tax assessment. The present value of wells and other leasehold equipment is also included. Like any tax on the value of gas reserves, "production factors" are a significant part of the valuation process. But the thing being valued and taxed is not each Mcf or MMBtu of current production at the time of production; it is the present value of lease property, including the gas reserves remaining in the ground, that is being valued and taxed. Hence, each year -- year after year -- an Mcf of gas reserves in Kansas will continue to be valued and taxed under the Kansas *ad valorem* tax until that Mcf is eventually produced and sold. Only when that Mcf of gas is produced and sold, does the producer become subject to a tax that does qualify as a severance tax under section 110, i.e, section 79-4217 of the Kansas statute.

The affidavit submitted by CIG confirms that the Kansas *ad valorem* tax is primarily an asset or property tax, rather than a production or severance tax because it is based

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of production; exemptions. (a) There is hereby imposed an excise tax upon the severance and production of coal, salt, oil or gas from the earth or water in this state for sale, transport, storage, profit or commercial use, subject to the following provisions of this section. * * * Such tax shall be applied equally to all portions of the gross value of each barrel of oil severed and subject to such tax and to the gross value of the gas severed and subject to such tax. The rate for such tax shall be 8 percent of the gross value of all oil or gas severed from the earth or water in this state and subject to the tax imposed under this act. ***

32 See appendix.

upon "the present worth of the anticipated reserves"[33] less the costs of operation. Thus, it is quite simply, a tax on the current net value of recoverable reserves. As CIG argues, what is being taxed "is not the value of current production, but instead, the value of the leasehold interest, recognizing that current production is a 'yardstick' by which the value of the leasehold is measured."[34] Also, contrary to the KCC, the fact that the Kansas *ad valorem* tax may be greatly reduced in the case of a shut-in well does not turn the tax into a severance tax. That would be a case of the tail wagging the dog. This one feature of the tax that applies in that narrow circumstance when there is no production is not indicative of how the body of the statute operates when there is production. When there is production, the tax is applied just like any other property tax. In any event, when there is no production, there still can be an *ad valorem* tax assessed on the well and other lease property. A true severance tax only applies when gas is produced.

We also concur with the court's analysis that the 1980 amendment supports the view that the Kansas *ad valorem* tax is a property tax. The amendment requires that current actual production from a new well cannot be the basis for the tax if future production rates from the well are expected to be lower. Furthermore, our decision here is not contradicted by the 1982 amendment (section 79-4219) of the Kansas statute. That section provides that taxpayers who are subject to *ad valorem* taxes get a credit to the Kansas severance tax (section 79-4217) in an amount equal to 1 percent of the gross value of gas severed and taxable under the severance tax. Because current production may be factored into the *ad valorem* tax valuation (albeit to better assess expected future production and, therefore, the value of the remaining reserves), and also is taxed

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33 Hagemann affidavit, p. 3.

34 CIG Ans. at p. 25.

under the severance tax provision, the credit simply reflects that a small portion of the *ad valorem* tax may be somewhat redundant with a small (1 percent) portion of the severance tax. The relative insignificance of the credit vis-a-vis the total *ad valorem* tax base and resulting tax liability makes it abundantly clear that the *ad valorem* tax ultimately found due on a property is not "upon" current production to any significant degree.

B. Date of Application of the Ruling of this Case

Since we have concluded that the Kansas *ad valorem* tax does not qualify as being similar to a state severance tax under NGPA section 110, we must also determine the effective date of our decision. The issue before us is whether and, if so, to what extent this ruling should be made retroactively effective. A finding that our ruling should have prospective effect would have no effect at all inasmuch, as effective January 1, 1993, the statutory ceiling prices on natural gas were removed. Further, the date of enactment of the NGPA, December 1, 1978, is the maximum limit of potential retroactivity here because we have found that the Kansas *ad valorem* tax does not qualify under section 110 of the NGPA and, hence, reimbursement of that tax in addition to the ceiling violates the Congressionally-set maximum lawful prices. As discussed below, we do not view our authority as limited by the relevant case law to a choice only between maximum retroactivity and prospective application. Accordingly, we believe that there are a number of other relevant dates that could be considered for purposes of refunds: for example, the date the applicants sought a declaratory order in the instant proceeding (August 22, 1983); the date of the Commission's order in Sun (July 23, 1986); or the date of the CIG decision

(June 28, 1988).[35] Upon review of the relevant court standards of administrative retroactivity, we conclude that our ruling should be applied retroactively to the date of the court's decision in CIG, June 28, 1988.

In its recent decision in *Williams Natural Gas Co. v. FERC*, Nos. 90-1545 and 91-1543, (September 21, 1993) (Williams), the United States Court of Appeals for the District of Columbia Circuit discussed the question of retroactive application of administrative agency rulings. The court explained that, although a precise statement of the factors to be considered has varied from case to case, it has typically applied the following factors initially set forth in *Retail, Wholesale & Dept. Store Union v. NLRB*:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[36]

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35 We do not consider the date of Opinion No. 699-D, October 1974, as a viable option, related to the NGA and this proceeding involves application of the statutory definition under the NGPA. Moreover no party has urged such a date.

36 466 F.2d 380, 390 (D.C. Cir. 1972) (Retail Union). In the past the Commission has applied the standards for judicial retroactivity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (Chevron v. Huson). See, e.g., *Dorchester Gas Producing Company*, 36 FERC ¶ 61,049 (1986), aff'd *Dorchester Gas Producing Co. v. FERC*, 848 F.2d 636 (5th Cir. 1988). In *District Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 949 F.2d 441 at p. 447 (D.C. Cir. 1991), the court noted that the Retail Union test concerning retroactive

However, the court in Williams did not review each factor as so stated and, instead, stated that, in applying the various versions of the Retail Union test, there has emerged "[a] basic distinction . . . between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear."[37] The court explained that in the latter context, which may give rise to questions of fairness, "it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule."[38] In the former case, it held, retroactivity is "natural, normal, and necessary."[39] Thus, the court stated, "we have repeatedly held that retroactivity is appropriate when the agency's ruling represents 'a new policy in a new situation,' rather than being 'a departure from a clear prior policy.'"[40]

This case involves a bit of both situations. On the one hand, as the court admonished in CIG, the Commission in Sun had no clear standard of analyzing state taxes for purposes of qualification under section 110. Today we are announcing that the common, historical standards for distinguishing between severance taxes and property taxes are to be applied. That would suggest full retroactivity. On the other hand, our ruling

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application of agency decisions appears substantively indistinguishable from the standard set forth in *Chevron v. Huson*. But see *Harper v. Virginia Dept. of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993).

37 Williams slip op. at p. 19 (citing *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986).

38 Id.

39 Id. (citing *NLRB v. Bell Aerospace*, 416 U.S. 267, 294 (1974)).

40 Id.

today clearly reverses an earlier Commission ruling that the Kansas *ad valorem* tax qualifies under section 110. As noted previously, the FPC had held in 1974 that the Kansas *ad valorem* tax was a "severance or production tax merely bearing the title *ad valorem* tax," and eligible for upward adjustment from the applicable national rate. Enactment of NGPA section 110 using the terminology of the FPC, and with the Conference Report stating that the provision concerning reimbursement of severance taxes should be "construed broadly,"[41] would, as the court noted in CIG, lead producers as well as purchasers to assume that the "Commission's earlier classification of the two states' taxes [Kansas and Texas] would carry over to the new regime."[42] Moreover, the Conference Report went on to add that the term severance tax "includes any tax imposed upon mineral or natural resource production including an *ad valorem* tax or a gross receipts tax."[43] That would suggest no retroactivity.

We think that the balance tips in favor of partial retroactivity. The "settled expectations of those who had relied on the preexisting rule" established by the Commission's several prior rulings on the Kansas *ad valorem* tax were changed by the CIG decision, not really our own decision today. Before that date, the parties could justifiably expect to recover Kansas *ad valorem* taxes in addition to NGPA ceiling rates with no expectation of a later refund obligation. After that date, given the clear signal by the court in its decision, the parties no longer would have been justified in relying on the Commission's earlier rulings with any assurance that they

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41 H.R. Conf. Rep. No. 1752, 95th Cong. 2nd Sess. 91, reprinted in 1978 U.S. Code Cong. & Adm. News, pp. 8800, 9007.

42 850 F.2d at p. 772.

43 Id.

would not later be required to make refunds of *ad valorem* taxes and could have taken steps to protect themselves, such as establishing an escrow account for such tax reimbursements. Our decision today merely adopts the court's analysis of the issue and rules in a way, we think, fully expected of this Commission by the court. For these reasons, we believe the date of the CIG decision most appropriately accommodates the Williams criteria, rather than either a fully retroactive application back to December 1, 1978, or a fully prospective application (with no effect whatsoever).

C. Refund Procedures

1. Procedures for Refunds by First Sellers

First Sellers who collected revenues in excess of the applicable maximum lawful price established by the NGPA as a result of the reimbursement of the Kansas *ad valorem* taxes for sales on or after June 28, 1988, shall refund any such excess revenues to the purchaser, including interest in full within 180 days after the Commission's final order is issued. The refund period will commence when the Commission's order becomes final.

2. Procedures for the Flowthrough of Refunds by Pipelines

Under the Natural Gas Act, the Commission has jurisdiction over the rates interstate pipelines charge their customers. We establish the following procedures for interstate pipelines to pass through any *ad valorem* tax refunds they receive from first sellers.

a. Method of Flowthrough by Interstate Pipelines

Due to the implementation of Order No. 636 [FERC Statutes and Regulations ¶ 30,939], interstate pipelines have terminated their PGA clauses, which included a mechanism to pass through any refunds they received. Since this mechanism was used to reduce a pipeline's unrecovered purchased gas costs balance which would normally have been recovered from its customers over the next twelve-month period, this mechanism usually did not result in the flowthrough of refunds to customers in the same relative proportions of the actual overcharges because of changes in purchased gas patterns.

Since the PGAs have been terminated, *ad valorem* tax refunds can no longer be flowed through the PGA clause. In place of the PGA clause, pipelines have implemented PGA close-out procedures. However, these close-out procedures may result in methodologies that are even more divergent from the proportionate sales ratios reflected in the PGAs. Therefore, to ensure that *ad valorem* tax refunds will be made to customers who overpaid the pipelines and to avoid the problems of allocating these refunds to a pipeline's current customers, the Commission will require interstate pipelines to make a lump-sum cash payment to the customers who were actually overcharged. We will require pipelines to make refunds to the customers actually overcharged within 30 days after receipt of refunds from the producers. If a pipeline does not make refunds within this 30-day period, the interest provisions in section 154.67(c) will be triggered and interest must be paid from the date the pipeline receives the refunds from the producers until the date the pipeline pays refunds to its customers.

The Commission believes that a pipeline should: (1) allocate the refunds between jurisdictional and non-

jurisdictional customers, and (2) allocate the total refunds due to the jurisdictional customers who were actually overcharged based on the proportion of each customer's purchases during the refund period compared to the total jurisdictional sales during the refund period. Pipelines would then pay this refund to those customers in a lump-sum cash payment. In any event, pipelines are to process *ad valorem* tax refunds from other pipelines in the same manner as *ad valorem* tax refunds received from first sellers because this procedure will return such amounts to those customers actually overcharged.

Finally, the Commission notes that pipelines will not be required to be guarantors of refunds. However, the Commission urges interstate pipelines to actively pursue refunds owed by first sellers.

b. Pipeline Refund Reports

The Commission will require interstate pipelines to file refund reports showing the amounts they received from producers (with principal and interest shown separately) and any producers who still owe refunds. The report must be filed 75 days after the date refunds are paid.

The refund report must also describe the basis a pipeline used to apportion the refunds among its customers and be served on all of the pipeline's customers. These reports will enable the Commission to assure that the customers have received appropriate refunds.

The Commission orders:

(A) The Kansas *ad valorem* tax does not qualify as a production, severance or similar tax under section 110 of the NGPA.

(B) The Kansas Corporation Commission's motion to reaffirm is denied.

(C) The Kansas Corporation Commission's motion to lodge is granted.

(D) The Kansas *ad valorem* tax may not be added to the maximum lawful price under section 110 of the NGPA on or after June 28, 1988.

(E) Any first seller that collected revenues in excess of the applicable maximum lawful price established by the NGPA as a result of the reimbursement of the Kansas *ad valorem* taxes for sales on or after June 28, 1988, shall refund any such excess revenues to the purchaser, including interest calculated in accordance with §§ 154.102(c) and (d) of the Commission's regulations, in full within 180 days after the Commission's final order is issued, and shall file a refund report with the purchaser's concurrence within 75 days thereafter.

(F) Interstate pipelines must follow the refund flowthrough procedures set forth in the text above.

Appendix

The Kansas Ad Valorem Tax

The ad valorem tax at issue is part of the general Kansas property tax imposed by Articles 79-1 through 79-28, Kansas Statutes Annotated. The properties are assessed by local assessors and taxed by local taxing jurisdictions within Kansas. Section 79-329 of the Kansas Statute defines properties that are capable of producing oil or natural gas in paying quantities, together with all casing, tubing or material thereon, as

"personal property" and, therefore, subject to Kansas *ad valorem* taxes. Section 79-330 provides that, in valuing such properties for the purpose of tax assessment,

> there shall, in addition to the value of all oil-or gas-well material in or upon the leasehold properties, be made such valuation of the oil or gas wells as would make a reasonable and fair value of the whole property.

Section 79-331(a) states that in determining the value of oil or gas leases or properties, the appraiser shall take into consideration:

> the age of the wells, the quality of the oil or gas being produced therefrom, the nearness of the wells to market, the cost of operation, the character, extent and permanency of the market, the probable life of the wells, the quantity of the oil or gas produced from the lease or property, the number of wells being operated, and such other facts as may be known by the appraiser to affect the value of the lease or property.

Section 79-331(b) establishes an exception to section 79-331(a) in the case of new wells. Paragraph (b) provides that if a new well commenced production on or after July 1 of the preceding year, the actual production during the remainder of that preceding year will be reduced to 60 percent of that actual volume and then annualized. In Sun, the Commission explained that this latter provision was designed to correct for the unusually high production rates of new wells ("flush production") in estimating production in subsequent periods. 36 FERC ¶ 61,093, at p. 61,224 Section 79-501 requires that

tangible personal property shall be appraised at its fair market value which section 79-a defines as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming the parties are acting without undue compulsion." Section 79-a goes on to list various factors that are to be considered in determining fair market value, in addition to sales, such as location, depreciation, cost of inter alia, by capitalization of net income.

In CIG, the court described how the Kansas *ad valorem* tax is calculated:[1]

> The market value of annual production is calculated by multiplying past production (averaged over a three- or five-year period where available) by the price actually paid the producer on January 1 of the assessment year. Kansas then capitalizes annual production (i.e., infers a present capital value from income expected to be received over the future) by multiplying it by a "present worth factor" or "PWF."

As would any capitalization formula, the PWF incorporates an assumed discount rate and expectations as to future price changes. Because natural gas is an exhaustible resource, the PWF also builds in assumptions (or information) about rates of decline in production and the probable length of production; these naturally vary from property to property.

* * * * *

1 850 F.2d at p. 771.

The PWFs in Table B range from 3.915 (for a zero decline rate and an eight-year life) to .673 (for a 50% decline rate and a five-year life). After annual production is multiplied by the PWF, the resulting figure is adjusted downwards for operating costs and upwards for the assumed value of equipment. Although production plays an important role in tax computation, the variation caused by other elements-included because of the state's interest of ascertaining capital value-may make the ultimate tax on equal production vary nearly by a factor of ten.

The court's description is consistent with the description of how the tax is determined in the affidavit of a Timothy N. Hagemann, a Kansas Certified County Appraiser, submitted with the Kansas Corporation Commission's (KCC) motion to Reaffirm. The affidavit states that:

> (1) The appraiser first determines the well's "total average gas production." For a property in a major proven gas field, the total average production is the numerical average of production for the previous five years or the adjusted volume, after consideration for overages, underages and anticipated curtailed volumes. If the property is located in a field that is not considered a major field, the total average production is the numerical average of the past year's production.[2] The amount of

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2 According to the Hagemann affidavit, the appraiser may adjust actual production figures to account for abnormal events. Thus, if production had been curtailed and then suddenly was resumed, the appraiser would adjust his assessment upward to reflect the anticipated increase in production for the upcoming year. Conversely, if a well has been overproducing and has exceeded its allowable production, the assessment will be lowered to reflect the anticipated curtailment.

remaining recoverable reserves are not taken into consideration.

(2) The appraiser then multiplies the absolute average production by the "net price received." The net price received is the price of gas as of January 1 of the tax year.

(3) Next, the appraiser multiplies the estimated gross income stream by the "present worth factor" or "present value factor." The present worth factor is the product of (1) the rate of decline of gas reserves, (2) the assumed rate of increase in the value of gas, and (3) the present value discount factor. Present worth factors are promulgated by the Department of Revenue for each major proven gas field and are identical for all properties within the field. For properties in other fields, the appraiser must calculate the reserve decline rate based on the prior two year's production.

* * * * *

(4) Finally, the appraiser adjusts the gross reserve value by deducting an allowance (fixed by the Department of Revenue for each field) for the present value of future operating costs. The appraiser also adds a standard amount to reflect the value of equipment, if applicable.

The result of all these calculations is the total "appraised value of gas production." The applicable tax rate is applied to 30 percent of the total appraised value.

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In the Supreme Court of the United States

MIDWEST GAS USERS' ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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1489

QUESTION PRESENTED

During the 1990s, the Federal Energy Regulatory Commission (FERC) ordered natural gas producers to refund to interstate natural gas pipelines certain charges that the producers had collected based upon their payment of *ad valorem* taxes to the State of Kansas. FERC required interstate pipelines that received refunds to pass the refunds through to their customers, including local distribution companies. The question in this case is whether, under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, FERC should have compelled local distribution companies that received refund distributions to pass their recoveries through to their retail customers.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 33a-35a) is unreported. The orders of the Federal Energy Regulatory Commission (Pet. App. 1a-22a, 23a-32a) are reported at 95 F.E.R.C. ¶ 61,055 and 95 F.E.R.C. ¶ 61,366.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 36a-39a). The petition for a writ of certiorari was filed on May 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), asserts federal regulatory jurisdiction over the transportation of natural gas in interstate commerce, the sale of such gas for resale, and persons who engage in such transportation or sale. Section 1(b) further provides, however, that federal jurisdiction does not apply to, *inter alia*, "any other transportation or sale of natural gas or to the local distribution of natural gas." 15 U.S.C. 717(b).

Until 1978, the Federal Energy Regulatory Commission (FERC) regulated all sales of natural gas in interstate commerce for resale, "whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682 (1954). The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, however, generally exempted "first sales" of natural gas from regulation under the NGA.[1] 15 U.S.C. 3431(a)(1)(A). The NGPA imposed gradually escalating price ceilings on first sales of gas, while providing for the eventual elimination of those ceilings for certain categories of gas. See 15 U.S.C. 3311-3320 (1982).

2. In 1996, the United States Court of Appeals for the District of Columbia Circuit affirmed administrative orders in which FERC ruled that the NGPA did not permit natural gas producers to recover the costs of paying *ad valorem* taxes to the State of Kansas, to the extent that such recoveries caused the sales price of

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[1] The NGPA's definition of "first sale," 15 U.S.C. 3301(21), includes sales at the wellhead, but excludes any sale by a pipeline or local distribution company of gas that did not come from the seller's own production.

natural gas to exceed NGPA price ceilings. *Public Serv. Co. of Colo. (Public Service)* v. *FERC*, 91 F.3d 1478, 1482-1486 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997). The court of appeals held that the producers' liability for FERC-ordered refunds extended back as far as gas produced in October 1983. *Id.* at 1488-1491.

In April 2001, FERC approved a settlement that partially implemented its refund orders and the *Public Service* decision. Pet. App. 1a-22a. Under the settlement, participating producers agreed to refund certain *ad valorem* overcharges to Williams Gas Pipelines Central, Inc. (Williams), an interstate natural gas pipeline. *Id.* at 1a-2a, 9a-10a. Williams agreed to distribute approximately 85% of the refunds it received from the producers to its sales customers in Kansas. The settlement allowed Williams to retain a portion of the remaining refund amount, and Williams agreed to distribute the balance of its refunds to its customers in other States. *Id.* at 11a, 31a; see Pet. 6.

3. Petitioner is an association of commercial and industrial gas users. Pet. iv. Petitioner's members purchased gas at retail from Kansas local distribution companies (LDCs) that bought gas from Williams and are entitled to distributions of refund amounts Williams received under the settlement. Pet. App. 27a-28a. Petitioner objected to the Williams settlement during FERC's approval proceeding, arguing that the Stipulated Settlement Agreement did not require the LDCs to make a sufficient distribution to petitioner's members and that FERC should require Williams to make its payments to LDCs in trust for the LDCs' retail customers or, alternatively, that FERC should require Williams to distribute refund amounts directly to the LDCs' retail customers. *Id.* at 13a-14a; see *id.* at 28a-

29a. In its order approving the settlement, FERC rejected petitioner's objection. *Id.* at 21a. FERC explained that, as it had held in earlier decisions, "the distribution of refunds by an LDC [to its customers] is a matter within the purview of state and local regulatory authorities." *Ibid.* (citing *Northern Natural Gas Co.*, 93 F.E.R.C. ¶ 61,311 (2000); *Colorado Interstate Gas Co.*, 93 F.E.R.C. ¶ 61,185 (2000); *Columbia Gas Transmission Corp.*, 31 F.E.R.C. ¶ 61,307, at 61,686 n.38 (1985)).

In June 2001, FERC denied petitioner's request for rehearing. Pet. App. 23a. FERC noted that its orders requiring producers who recovered the costs of Kansas *ad valorem* taxes to pay refunds to interstate pipelines, also required the pipelines to pass through the refunds "to the '*customers who overpaid the pipelines.*'" Pet. App. 31a (quoting *Colorado Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292, at 62,374 (1993)) (emphasis added). FERC explained that, in the context of the Williams settlement, the "customers who overpaid the pipelines" are customers who purchased the gas from Williams. *Ibid.* Furthermore, FERC continued, there had never been a judicial order requiring FERC to mandate that the producers' refunds be directed to ultimate consumers of gas. *Ibid.* FERC additionally concluded that the issue of how refunds received by LDCs should be allocated to the LDCs' retail customers involves the rates charged by local distribution companies to their retail customers and, therefore, is "within the purview of state and local regulatory bodies." *Id.* at 31a-32a.

4. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 33a-35a. The court determined that it was "clear" that neither the NGA nor the NGPA authorizes FERC "to require the pass through of the Kansas *ad valorem* tax refunds to the ultimate

consumers of natural gas." *Id.* at 34a-35a (citing *FERC* v. *Martin Exploration Mgmt. Co.*, 486 U.S. 204, 207 (1988), and *Panhandle E. Pipeline Co.* v. *Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516-517 (1947)). Petitioner filed petitions for rehearing and rehearing en banc, which the court of appeals denied. *Id.* at 36a-39a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), expressly disclaims federal jurisdiction over "the local distribution of natural gas." Section 1(b) also excludes from federal regulation under the NGA final retail sales of gas to ultimate consumers. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) ("[T]he Act's application to 'sales' is limited to sales of interstate gas for resale."). Petitioner, however, contends (Pet. 10-11, 16-18) that provisions of the Natural Gas Policy Act manifest an intent by Congress to require FERC to approve the allocation of refunds of NGPA overcharges between local distribution companies and their retail customers. The NGPA does not establish such a requirement.

Section 601(a) of the NGPA, 15 U.S.C. 3431(a), establishes specific exceptions to the NGA's general jurisdictional rules, none of which terminates state regulatory authority over final retail sales of gas. Petitioner nevertheless argues (Pet. 17) that Sections 601(b) and (c) of the NGPA, 15 U.S.C. 3431(b) and (c), give FERC "a pervasive role in establishing natural gas pricing and assuring that [NGPA] pricing [i]s properly passed through to the retail level." Petitioner reasons (Pet. 16-

18) that Congress therefore must have intended to require FERC to ensure that LDCs pass through to ultimate retail customers any refund distributions the LDCs might receive as a result of violations of the NGPA's price ceilings for first sales of gas.

The pricing provisions of Sections 601(b) and (c)—upon which petitioner bases its argument—apply only "[f]or purposes of sections 4 and 5 of the Natural Gas Act," 15 U.S.C. 717c, 717d. 15 U.S.C. 3431(b) and (c). Sections 4 and 5 of the NGA address rates and charges for transportation or sales of gas that are *subject to FERC's jurisdiction.* See 15 U.S.C. 717c, 717d. Because FERC's sales jurisdiction does not extend to retail sales of gas to ultimate consumers, see, *e.g.*, *Panhandle E. Pipeline Co.* v. *Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516-517 (1947), the pricing and pass-through protections of NGPA Sections 601(b) and (c) also do not apply to such retail sales. Thus, Section 601 of the NGPA provides no support for federal allocation of overcharge refund amounts between the LDCs and their retail customers.

Petitioner also relies (Pet. 10-11) upon provisions of the NGPA that directed FERC to develop incremental-pricing surcharges in order to discourage use of natural gas as a boiler fuel, see NGPA §§ 201-205, 15 U.S.C. 3341-3345 (1982). Those provisions, which were repealed by the Act of May 21, 1987, Pub. L. No. 100-42, § 2, 101 Stat. 314, authorized FERC to require interstate pipelines to impose surcharges on gas delivered for use as boiler fuel, and required LDCs paying such surcharges to pass them through to boiler-fuel customers. See 15 U.S.C. 3344(c)(2)(B), 3345(a) (1982). Those boiler-fuel provisions, however, did not address the allocation of refunds for excessive charges that violated the NGPA price ceilings. Indeed, Congress's pre-

scription of detailed pass-through rules for federally required surcharges in the specific context of boiler fuel highlights the absence of any general requirement that FERC must require LDCs to pass through other charges or refunds to their customers.

2. Petitioner asserts (Pet. 12-13) that language in other D.C. Circuit decisions that addressed treatment of Kansas *ad valorem* taxes under the NGPA compels FERC to direct the LDCs to pass-on their refund distributions to retail consumers. In its decision in this case, however, the D.C. Circuit upheld FERC's determination (Pet. App. 31a) that petitioner is misreading the earlier cases. See *id.* at 34a-35a. The court of appeals' parsing of its own precedents does not warrant review by this Court. That is particularly true because the court of appeals has read its own decisions—none of which addressed the question of whether FERC must mandate pass-through of refunds to ultimate consumers —in a manner that is consistent with the States' well-established jurisdiction over retail sales of natural gas.[2]

3. Finally, petitioner contends (Pet. 14-15) that FERC's approval of the Williams settlement conflicts with this Court's decision in *New York* v. *FERC*, 122 S. Ct. 1012 (2002). In that case, the Court held that Section 201 of the Federal Power Act (FPA), 16 U.S.C. 824, authorizes FERC to exercise jurisdiction over the *transmission* in interstate commerce of electric energy that is sold at retail, when the transmission service is

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[2] Because petitioner misreads the court of appeals' earlier decisions, it is immaterial whether, as petitioner suggests (Pet. 14), Section 501(a) of the NGPA—which authorizes FERC to "perform any and all acts * * * as it may find necessary or appropriate to carry out its functions" under the NGPA, 15 U.S.C. 3411(a)—would give FERC the authority to implement petitioner's erroneous construction of those decisions.

"unbundled" from the State-regulated retail sale of energy and the retail customer has the ability to choose a preferred power supplier.[3] See 122 S. Ct. at 1022-1027. Far from suggesting that the FPA compels FERC to regulate all "retail energy transactions," as petitioner suggests (Pet. 14), the Court reaffirmed in *New York* that the FPA "limit[s] FERC's [jurisdiction over sales of electric energy] to that at wholesale" (122 S. Ct. at 1022), and therefore does not provide FERC with jurisdiction over retail sales of energy that are unbundled from interstate transmission service.

The Court itself drew an analogy in *New York* (122 S. Ct. at 1022-1023) to the jurisdictional rules of the NGA, as described in *Louisiana Power & Light*, *supra*. As noted above, those rules limit FERC's "sales" jurisdiction to sales of interstate gas for resale. See 406 U.S. at 636; see also *id.* at 639 ("Congress withheld *rate-setting* jurisdiction over direct sales [of gas]."). Thus, the reasoning and holding of *New York* are entirely consistent with the settled rule that FERC's sales jurisdiction does not authorize FERC to regulate LDCs' rates for their retail sales of gas. That settled rule defeats petitioner's claim that FERC was required to determine whether, and in what amount, LDCs must pass through overcharge refund distributions to their retail customers.

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[3] The Court did not decide whether the FPA allows FERC to exercise jurisdiction over retail transmission service that is sold together with electric energy in a single "bundled" transaction between a public utility and its retail customer, where the retail customer cannot choose a preferred power supplier. See 122 S. Ct. at 1028.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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